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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a–19a) is reported at 399 F. 2d 356. The Board's supplemental decision and order are reported at 158 NLRB 1414 (Appendix D, *infra*, pp. 25a–117a).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1968 (Appendix B, *infra*, pp. 20a–22a). On October 1, 1968 the court of appeals denied th··

Board's timely petition for rehearing *en banc* (Appendix C, *infra,* pp. 23a–24a). On December 23, 1968, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including January 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in denying employees backpay to which they were otherwise entitled under the National Labor Relations Act because of the Board's alleged "inordinate delay" in processing the backpay claims.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) and the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. (1964 ed.) 1001, *et seq.*) are set forth in Appendix E, *infra,* pp. 118a–119a.

STATEMENT

In April, 1954, after the respondent J. H. Rutter-Rex Manufacturing Co. ("the Company") failed to bargain in good faith with the certified representative of its employees, the Amalgamated Clothing Workers of America, AFL–CIO,[1] the employees went on strike. Subsequently, the National Labor Relations Board found that the Company's failure to bargain violated Section 8(a) (5) and (1) of the National Labor Re-

[1] The Union was a party in the court of appeals.

lations Act, 29 U.S.C. 158(a) (5) and (1), and that the strike was caused by the Company's unfair labor practices. It directed, *inter alia,* that the Company

> Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went out on strike * * * dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reason of the [Company's] refusal, if any, to reinstate them * * *,

with an employee's eligibility for back pay to commence five days after his application for reinstatement. *J. H. Rutter-Rex Mfg. Co.,* 115 NLRB 388, 391. The court of appeals enforced the Board's order, *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.,* 245 F. 2d 594 (C.A. 5), and embodied the above provision in its decree, entered on August 19, 1957.

By the time the court entered its decree, all the employees whose backpay claims are at issue in this case had made the necessary application for reinstatement. The strike had been terminated by the Union on April 5, 1955 (R. 172–173). A small number of strikers had applied for reinstatement prior to that date (R. 215–520). Between April 5 and May 13, 1955, the Union made an unconditional application for the reinstatement of approximately 159 strikers (R. 172–175; 1085–1091; Vol. X 160–165, 168–172). The Company did not respond with an offer to reemploy, which would have avoided any backpay liability on its part, but rather suggested that strikers desiring to return to work

make application to its personnel office at the rate of 20 per day (R. 173–174; 1088; Vol. X–167). While many strikers were rehired in this manner, others were not; as of July 8, 1961—the closing date for the Board's backpay specification in this case—35 strikers with valid backpay claims had not yet received complying offers of reinstatement.

On August 21, 1957, following the entry of the court's decree, the Board's regional office wrote to the Company. It offered assistance in "effecting prompt compliance" with the decree and also stated:

> When you have fully complied with the affirmative terms of the decree and there are no violations of its negative provisions, you will be notified that the case has been closed. Until you receive such notice you will know that the case remains open for all purposes as awaiting compliance. [R. 738–739.]

Two and one half months later, counsel for the Company wrote to the regional office that it had complied with "*some* of the provisions of the decree" (emphasis supplied); he stated:

> If any instance of a failure to fully comply with the order is brought to your attention, we would appreciate your contacting us promptly so that such corrective measures as may be necessary can be immediately taken in order to assure full compliance with the decree. [R. 189–190; 957.]

At this time and for several years thereafter, the Board in general and its New Orleans regional office in particular were under an extremely heavy caseload while their manpower resources were severely limited

(R. 732–734). Except for occasional help by an attorney or field examiner, the regional office's one compliance officer worked on all compliance cases in the region, including this one, alone (R. 968–969). For this reason, the Board did not write the Company specifically concerning the backpay aspects of the Company's case until March, 1960, when it requested the Company's payroll, Social Security and personnel records (R. 958). On the basis of these records and others obtained by the regional office, approximately 575 backpay claims were sifted; these included claims that reinstatement had been delayed or granted to an inferior position, as well as that it had been entirely denied. By October, 1960, the regional office had sufficient manpower to assign an attorney to the case full time (R. 969); he had to locate and interview each of the employees concerned and to examine the Company's records, in order to determine who had been reinstated, when reinstatement had been effected, what was the level of gross backpay due, and whether there were any set-offs against backpay for individual employees due to interim earnings, unavailability for employment, or the like (R. 733–734).

On November 16, 1961, the result of this investigation was announced in the form of a 428-page backpay specification, issued and served on the Company by the Regional Director pursuant to the Board's Rules and Regulations (R. 742–907). Over 360 of the backpay claims were rejected (R. 733, 1036–1937); but the Director found that 207 employees either had never been reinstated or had been reinstated more than five days after their unconditional application for

reinstatement, and set forth on their behalf backpay claims current to July 8, 1961, totaling $342,764.07.

After obtaining an extension of time within which to file its objections to this specification with the Board, the Company applied to the court of appeals to enjoin further action in the backpay proceedings because of the delay in issuing the specification. The court of appeals temporarily stayed the proceedings before the Board but then declined to intervene and dissolved its stay, *National Labor Relations Board* v. *J. H. Rutter-Rex Co.*, 305 F. 2d 242, and in September, 1962, the Company filed its answer to the specification.

In subsequent proceedings before the Board, the Company's repeated objection that the delay in issuing the specification barred the claims was rejected, but specific challenges to the awards were entertained and the scope of the backpay order was considerably reduced in consideration of them. Thus, in a decision of June 2, 1964, the Trial Examiner denied backpay to 35 of the 207 remaining claimants, and reduced the total amount to be paid to $160,894.69, as of June 30, 1961 (R. 7–8, 166–554). In a decision of June 3, 1966, the Board adopted the Trial Examiner's findings, conclusions and recommendations in substantial part, but modified the award as to twelve individuals (R. 52–57); it ordered the Company to pay a total of $159,016.32 to 171 employees.

The court of appeals furthered narrowed the order by refusing to enforce the award as to ten of the employees, an action which the Board believes to have been erroneous but which does not, in its view, war-

rant further review here. The court of appeals also, however, limited its enforcement of the Board's award for the remaining 161 employees to the period ending June 30, 1959, thus cutting off the claims of 37 employees who had not received a complying offer of reinstatement by that date. The court stated that the Board had done "nothing of any consequence" to obtain compliance with the reinstatement-backpay aspects of the decree from the letter it sent in August, 1957, until its March, 1960, request for records; and that, although the Company itself had "moved at a snail's pace" in the reinstatement of its employees (*infra,* p. 11a), and could not shift or avoid its duty of compliance by asking the Board to notify it of any instances of noncompliance with the decree, nevertheless the Board's inaction constituted "inordinate" delay (*infra,* p. 14a) which "lulled [the Company] into the belief that the Board was satisfied and that no further action was to be expected" (*infra,* p. 15a). Although the court acknowledged that the doctrine of laches cannot be invoked against the government (*infra,* p. 4a), it concluded that the Administrative Procedure Act gave the Company "a legal right to expect the Board to proceed with reasonable expedition" and that the "inordinate" 4-year delay between the court's first decree and the backpay specification prejudiced the Company's ability to defend the backpay claims (*infra,* pp. 17a–18a). The court then chose the June 30, 1959, date as the most suitable accommodation of the competing interests "of the Board, of the Union, and of the employees" (*infra,* p. 17a).

REASONS FOR GRANTING THE WRIT

Although the court of appeals purported to recognize the well-established doctrine that a suit brought by the United States or any of its agencies to enforce a public right may not be defeated on grounds of laches,[2] its holding that the Board's "inordinate delay" in processing the backpay claims requires an artificial limitation of otherwise valid employee claims to backpay is directly contrary to that doctrine. In particular, it conflicts with this Court's decision in *National Labor Relations Board* v. *Electric Vacuum Cleaner Corp.*, 315 U.S. 685, and with cases in the courts of appeals which have refused to make delays by the Board in processing complaints or compliance issues an occasion for depriving employees of their backpay remedy.

This Court repeatedly has recognized that the remedy of back pay and reinstatement protects a public, not a private, right; it is "designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. The Board is the only party which can institute a backpay proceeding; it does so to vindicate the public interest,

[2] *United States* v. *Summerlin*, 310 U.S. 414, 416; *Board of County Commissioners* v. *United States*, 308 U.S. 343, 351; *Guaranty Trust* v. *United States*, 304 U.S. 126, 132–133; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 125; *United States* v. *Beebe*, 127 U.S. 338, 344.

not simply to further the private rights of the employees involved. Thus, as the court of appeals itself recognized, the Company "could not avail itself of the defense of laches" (*infra*, p. 4a). "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748 n. 16.

In *Electric Vacuum Cleaner Corp., supra*, this Court declined to shorten the period of backpay compensation despite the Board's two year delay in determining whether there had been any unfair labor practice; while it agreed that the processing of complaints "as quickly as is consistent with good administration is of course essential," it refused to "penalize the employees" for delays. 315 U.S. at 698.[3] Here, on the other hand, the existence of the unfair labor practice was promptly determined, so that the Company was aware of its reinstatement and backpay obligation throughout the period of alleged delay. The Company could have limited its backpay liability at any point by making offers of reinstatement, as the Board had ordered it to do. In two similar cases, *National Labor*

[3] See also *National Labor Relations Board* v. *William Davies Co.*, 135 F. 2d 179, 184 (C.A. 7), certiorari denied, 320 U.S. 770; *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. 2d 809, 815–816 (C.A. 3); *National Labor Relations Board* v. *American Creosoting Co.*, 139 F. 2d 193, 196 (C.A. 6), certiorari denied, 321 U.S. 797; *Pacemaker Corp.* v. *National Labor Relations Board*, 260 F. 2d 880, 883 (C.A. 7); *National Labor Relations Board* v. *Injection Molding Co.*, 211 F. 2d 59, 66 (C.A. 8); *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. 2d 858, 862 (C.A. 6).

Relations Board v. *Mastro Plastics Corp.*, 354 F. 2d 170, 181 (C.A. 2), certiorari denied, 384 U.S. 972 (four years between enforcement and backpay specification), and *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 688-689 (C.A. 5), certiorari denied, 376 U.S. 911 (six and one half years between enforcement and backpay specification), the company's backpay liability was fully enforced.

The court's refusal fully to enforce the backpay order is not justified by Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a). Although that section requires "[e]very agency [to] proceed with reasonable dispatch to conclude any matter presented to it," the remedy for a failure so to proceed is that stated in Section 10(e)(A), 5 U.S.C. 1009(e)(A): courts may "*compel* agency action unlawfully withheld or unreasonably delayed." (Emphasis supplied.) Except for a reference to "statutory * * * limitations" in Section 1009(e)(B)(3), 5 U.S.C. 1009(e)(B)(3)—inapplicable here by reason of Section 10(b) of the Labor Act—there is no indication that a failure to proceed with reasonable dispatch makes subsequent agency action subject to being set aside as "unlawful."[*] *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4), on which the court below relied, was a case in which injunctive relief to compel agency action was sought under Section 10(e)(A). Here, the Company did not seek judicial help in speeding the compliance proceeding and the court below found "the

[*] The Board maintains that its action was reasonably prompt, considering its limited resources at the time, and the fact that the Company knew its obligation.

record well sprinkled with instances in which the Company moved at a snail's pace in the reinstatement of these former employees" (*infra*, p. 11a), although its reinstatement obligation "just could not have been misunderstood" (*infra*, p. 9a). The case is thus much more like *Nabors* v. *National Labor Relations Board*, *supra*, where another panel of the Fifth Circuit found "no indication that Congress intended to overrule [the] long-settled doctrine [that the defense of laches could not be entertained against a claim of public right] by the enactment of the Administrative Procedure Act." 323 F. 2d at 688-689.

Moreover, the court's refusal fully to enforce the backpay specification has denied the employees a substantial portion of the remedy which the Board found appropriate in the public interest, in effect foreclosing reinstatement for 35 employees as well as reducing the backpay due to them.[5] Although the court correctly recognized that backpay "is designed to enforce a public, not a private right," it took the limited view that "[t]he purpose of a backpay award is *to deter*

[5] Thirty-five employees whom the Board and court agreed were entitled to reinstatement had not received offers of reinstatement as of July 8, 1961, the last day to which the Board's backpay specification applied. But for the court's order, backpay would have continued to accrue for these employees until an offer was made—thus encouraging the Company to honor its reinstatement obligation. Under the court's order, the Company now is subject only to the possibility of contempt proceedings to enforce these reinstatements, and can await the Board's initiative. Indeed, the court's peroration, "let the books be closed" (*infra*, p. 19a), suggests that the contempt remedy may be unavailable and that the Company's obligation to reinstate these employees may never be enforced.

unfair labor practices * * *" (*infra,* p. 17a; emphasis supplied). But it is equally the purpose of backpay awards to remedy the prior unfair labor practices which required them—to restore balance in the labor relationship by denying the illegal actor any advantage from his unfair practices, and redressing so far as is possible any harm which it may have done. As the Second Circuit recognized in *National Labor Relations Board* v. *Mastro Plastics Corp., supra,* delay is prejudicial to this purpose also:

> Certainly to the discriminatees, a delay of this magnitude must render the back pay award a wholly inadequate and unsatisfactory remedy for their wrongful discharge. Although the Board began awarding interest on back pay awards subsequent to its decision here, see Isis Plumbing & Heating Co., 138 NLRB 716 (1962), even this could not undo the economic hardship caused by many years of undeservedly substandard earnings. Moreover, the substantial delay in enforcing the back pay remedy significantly undermines its usefulness in fulfilling the public policy of promoting full production and employment.
>
> This is not a case where the Board has intentionally acted in a manner contrary to its duty to "proceed with reasonable dispatch to conclude any matter presented to it." Compare Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (4 Cir. 1961). Rather, the delay has stemmed from the inherently time-consuming nature of the back pay remedy, complicated by a serious and protracted shortage of Board personnel capable of preparing the specification. [354 F. 2d at 180–181.]

The effect of the court's decision on the administration of the Act is likely to be substantial and harmful. Employers are often recalcitrant in complying with Board remedial orders; by delaying or preventing reinstatement an employer may be able to aggravate or assure the weakening of a union movement which was the target of his unfair labor practices in the first place. To that extent, it may be to the employer's interest to wait for the Board to take the first step in securing compliance with reinstatement orders. The steady cumulation of backpay liability acts as a counter-pressure to this attitude; since at any moment the employer can limit his liability by making a complying offer of reinstatement, the backpay order serves in this respect to promote self-compliance with reinstatement orders. Cf. *National Labor Relations Board* v. *Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 347–348. Curbing the cumulation of backpay, as was done in this case, limits this incentive. Thus, the probable effect of this decision, if allowed to stand, will be to diminish voluntary compliance with Board orders, and, correspondingly, to increase the number of cases in which there will be litigation over compliance matters; as a result, there will be greater delay in securing compliance generally, and interference with and interruption of the remedial scheme Congress ordained.

In sum, although the court of appeals acknowledged that the defense of laches could not be entertained against backpay awards, it substantially limited the award in this case on the basis of very similar considerations: the duration of Board inaction, and as-

sumed prejudice to the Company's ability adequately to defend itself as a result. The court could not respond directly to those considerations—for example, by foreclosing backpay for the period *up to* the Board's active participation in compliance proceedings—without appearing to permit the defense in all particulars. Rather, it imposed the arbitrary compromise of a June 30, 1959, cut-off date on the backpay awards. The likely effect of this action on the remedy in this case and on compliance proceedings in the future is scarcely less harmful than would have been a straightforward acceptance of the laches defense; the court's holding is unauthorized by statute and is in conflict with the several decisions cited above.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

JANUARY 1969.

APPENDIX A

In the United States Court of Appeals
for the Fifth Circuit

No. 23744

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 23909

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions for Review (Nos. 23,744 and 23,909) and on Cross-Petition for Enforcement (No. 23,744) of an Order of the National Labor Relations Board

(Louisiana Case)

(July 23, 1968)

Before COLEMAN and SIMPSON, Circuit Judges, and DAWKINS, District Judge.

COLEMAN, Circuit Judge: This litigation beclouds the highly respectable idea that all litigation must, some day, come to an end. 164 volumes of the Federal

329-026—69——2

Reporter [2d] have been published since this case first appeared in this Court, 229 F.2d 816, 1956. Indeed, the controversy has survived a complete turnover, save one, of the judges in active service on this Court.

I

To go back to the origins of the difficulty: In May, 1953, the Amalgamated Clothing Workers of America, CIO, attempted to organize the 600 employees of the J. H. Rutter-Rex Manufacturing Company, Inc. On July 30, 1953, the president of the Company, made a speech at the plant in which he stated that "he would not tolerate 'any damn union in the plant'; that the last time the union had tried to organize his plant he had 'personally fired 300 girls', and would fire 400 to 500 more 'if necessary'", 229 F.2d at 817. The record in that appeal further reveals that a Company vice-president had exercised impermissible surveillance of employee union activities, had threatened to fire other employees for their union activities, and had coercively interrogated others. Some employees had been discriminatorily discharged. The situation was such that in its opinion reviewing that stage of the case a panel of this Court [Chief Judge Hutcheson and Judges Rives and Cameron] stated that the record was permeated throughout with cogent testimony of company antipathy toward the union, 229 F.2d at 819. The Court directed enforcement of the Board Order, which had found Rutter-Rex guilty of § 8(a)(1) and § 8(a)(3) violations of the National Labor Relations Act.

In 1957, we had the parties again, 245 F.2d 594. That proceeding was initiated by a petition of the Board to enforce its order dated February 13, 1956. requiring Rutter-Rex to offer immediate and full reinstatement to certain of its former employees. Again,

this Court [Chief Judge Hutcheson and Judges Jones and Brown] decreed enforcement.

We recite the foregoing as of some assistance to an understanding of the issues we are now required to resolve. It convinces us, of course, that Rutter-Rex is not, and has not been, a babe in the woods, now about to be victimized for ignorance or inadvertent ineptitude in the field of employer-employee relations, as regulated by the National Labor Relations Act.

Enforcing the Board Order, our decree of August 19 1957, by reference thereto, directed the Company to offer reinstatement, upon application, to all employees who went on strike on April 21, 1954, or thereafter, and to:

> "make whole such strikers for any loss of pay they may have suffered by reason of the Company's refusal, if any, to reinstate them, by paying to each of them a sum of money equal to that which he would normally have earned, less his net earnings, during the period from 5 days after the date on which he applies for reinstatement to the date of the Company's offer of reinstatement. Loss of pay shall be computed on a quarterly basis", [115 NLRB 388].

The present controversy was commenced on November 14, 1961, by a Backpay Specification issued by the Regional Director, which notified the Company of its right to file an answer thereto within fifteen days. The Company filed an application in this Court for an injunction, seeking to enjoin the Board from proceeding further with the Backpay Specification because of the lapse of time in filing it. We denied a permanent injunction, 305 F.2d 242, concluding that we should not take any further action *prior to such time as a final order might be entered [by the Board] or other final action taken.* Special note is taken, however, that this

Court then asserted that "there has been inordinate delay in this case." Inordinate means "in excess of reasonable limits".

We now have before us the petition of the Company, filed June 8, 1966, to review the Supplemental [Backpay] Order of the Board issued on June 3, 1966, 158 NLRB 1414. We likewise have the petition of the Amalgamated Clothing Workers of America, AFL-CIO (the Union) to review, set aside, and modify certain portions of that order. By its answer, the Board requests that its Supplemental Order be enforced in full. These consolidated proceedings [No. 23,744 and No. 23,909] present us with a record 5,297 pages in length, in addition to 297 pages of Exhibits, and more than 600 pages of briefs. We have had the case under analysis and consideration for more than half a year, as a result of which we are convinced that the appropriate disposition of the issues raised is really not so abstruse or complex as counsel, in their commendable zeal, have conceived it to be. All contentions have been thoroughly considered but this opinion will discuss only those regarded as meritorious and necessary to the appropriate disposition of the case. There is no inclination that the opinion shall unnecessarily rival the length, or the volume, of the material submitted.

As a matter of fact, we see that most, if not all, of the contentions on behalf of the Company as to generally controlling legal principles were raised and settled in *W. C. Nabors* v. *National Labor Relations Board,* 5 Cir., 1963, 323 F.2d 686. *Nabors* was a reinstatement and backpay case, in which the Board delayed its Backpay Specification from May 31, 1955, to March 25, 1959, a period of almost four years. We there held that Nabors could not avail itself of the defense of laches, could not invoke state statutes of limitation, and could not introduce evidence to show

irreparable injury caused by undue delay. The Supreme Court denied certiorari, 376 U.S. 911, 84 S.Ct. 666, 11 L.Ed. 2d 609 (1964). *Nabors* further held that backpay, as used in the applicable statute, includes moneys which it is reasonably found that an employee would actually have received in the absence of unlawful discrimination; that lack of available jobs is an affirmative defense, that the burden of establishing such a defense rests on the employer, and the burden likewise rests with an employer attempting to prove a former employee's failure to make reasonable search for other employment.

II

We start our analysis of the pending issues by recalling that the Company began digging its costly pit by refusing to bargain with the duly certified Union, *National Labor Relations Board* v. *J. H. Rutter-Rex Manufacturing Co.*, 5 Cir., 1957, 245 F.2d at 595, 596. The Board ordered reinstatement of the striking employees. On June 19, 1957, we granted enforcement. The Order so enforced required reinstatement within five days after application therefor, plus backpay until the date of the offer of reinstatement, loss of pay to be computed on a quarterly basis.

The Backpay Specification of November, 1961, asserted backpay claims in the total amount of $342,000, up to July 1, 1961. Six hundred employees had gone on strike. 211 were reinstated before the strike ended. 299 were out on strike when the Union called it off, April 21, 1954. 132 were reinstated before the end of 1955, and by the close of 1956 there were but 70 who had not been reinstated. The Company contended that there were fifteen employees who were not entitled to reinstatement because they had been guilty of strike misconduct, including violence. The Board agreed as

to ten of these. The Board disqualified two employees for failure to apply for reinstatement, two were disqualified for abandoning the industry, and one was disqualified for non-availability.

In the order now under review, the Board awarded $159,016.32 in backpay to 171 individuals, less than half of the amount asserted in the Specification. The Trial Examiner denied backpay to approximately thirty-five. On review, the Board in its Supplemental decision and order of June 3, 1966, 158 NLRB 1414, adopted the findings, conclusions and recommendations of the Examiner in substantial part, and modified the Examiner's award as to twelve former employees.

For reasons to be discussed, the Company says that it should not have to pay anything.

III

The Union says that the ten employees should not have been disqualified for strike misconduct and that other employees were erroneously denied backpay in varying amounts. We are of the opinion that the findings of the Board in these cases are substantially supported by the record and that the order correctly applied the law. As to these items we decline to upset the Order.

Nor do we approve Union contentions that the Board erred both in reducing the gross backpay claims by 6% to take care of absences and in awarding 6% interest on the backpay awards from June 2, 1964, rather than from the date of discrimination.

IV

We now proceed to consider the Company attack. As usual, the Company says, in effect, that all is the fault of the Board; the Board responds that all is the

fault of the employer. As often happens, we do not wholly agree with either. We do agree with the Board that:

> "It is not the function of this Court to try the case de novo or to substitute its own appraisal of the evidence for that of the Board. If the Board has conceived the law correctly, if it has not acted arbitrarily or capriciously, and if its findings are supported by 'substantial evidence on the record considered as a whole,' they are conclusive and binding on this Court even though we might have made different findings upon an independent consideration of the same evidence." *N.L.R.B.* v. *Brown & Root, Inc.*, 8 Cir., 1963, 311 F.2d 447, 451.

A. Our 1957 Opinion

In *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company*, 245 F.2d 594, we held that (1) the duty of the Company to bargain with the certified Union did not terminate with the calling or execution of the strike, (2) the Company had been guilty of unfair labor practices in refusing to bargain collectively with the Union and in interfering with the employees in the exercise of their right to organize and bargain collectively, and (3) the Union had not been guilty of any practice justifying employer in breaking off bargaining negotiations.

In the present proceeding, which stems from that decision, the Company vigorously and repeatedly insists that our language at 245 F.2d 598 was not clear and unequivocal, that it left certain questions open to further action. The language so denominated was as follows:

> "The difficulties which the Employer now faces were not unknown when it set out on its forthright but risky course of declining to bargain

at all. For once the strike is an unfair labor strike, Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278, 76 S.Ct. 349, 100 L.Ed. 309, or becomes such, N.L.R.B. v. Crosby Chemicals, Inc., 5 Cir., 188 F.2d 91, 95, the employer is compelled under the Act to reinstate the strikers upon application even though it means discharging replacements hired during the strike.

"The numerous questions which the Employer insists now plague it, such as the possibility of non-strikers voluntarily terminating employment with subsequent replacement during the strike, the availability of work at various times considering the nature of these manufacturing operations, the number of strikers who may have declared their unwillingness to return to work, the calculation of the lost pay if any, the misconduct of some specified strikers which might afford a basis for denying reinstatement, are not foreclosed. Their resolution can come either in further administrative proceedings before and through the Board or in direct contempt proceedings, if brought before us, for failure to comply with our order decreeing enforcement.

"The employer certainly has no right to insist that until the strike whose continuation is a direct by-product of his own Section 8(a)(5) violation is terminated, no order of reinstatement can validly be made. Nor can the employer confound its violation by demanding that all of the matters be threshed out in the initial Board proceedings. Undertaking to ascertain the myriad of details respecting the right to, and extent of, the remedy as to each specific striker out of a large labor force would complicate the proceeding and perhaps make it endless."

We are of the opinion that the argument as to confusion or misunderstanding is without any real merit.

The Company, experienced in labor disputes and represented by outstanding counsel, could not have possibly overlooked the plain command of the Court's decree that the employees should be reinstated upon application and made whole for any loss of pay they might have suffered by a refusal to reinstate. This was the very heart of the litigation and the decree which followed. It just could not have been misunderstood.

Certainly, the Company was entitled to the benefit of the law as to failure to apply, the availability of jobs, bona fide offers to return, the availability of work, and the like. The focal consideration here is that if any of these items were hindering compliance with the enforced order then the Company could have applied to this Court for a clarification of its decree or it could have moved the Board to hear and settle any problem of material importance. The indisputable fact is that the Company applied for no such relief. It is too late now for us to entertain this plea. Upon the consideration of the record as a whole we are convinced that nothing in the opinion actually could reasonably have been confusing, or a stumbling block to compliance.

B. *Impossibility or failure of compliance*

On April 5, 1955 the Union notified Rutter-Rex that the employees had voted on March 31, 1955, to terminate the strike. The second paragraph of the letter stated "Please be advised that each of the employees whose names are listed on the attached sheets hereby offers to return to work for your Company unconditionally and immediately. Kindly inform us when and where these employees should return to work".

Attached was a list of 114 employees, with their street addresses indicated.

On April 8, an additional list of 25 names was submitted.

On April 11, Rutter-Rex responded, not with an unconditional reinstatement of these employees, but with the suggestion that:

> "Such persons as desire to return to work with us file application with our Personnel Office as soon as possible. Since we cannot process all applications at one time, we would suggest that you have the applicants come in at the rate of no more than twenty (20) per day."

On April 22, the Union notified the Company that although they had complied with the request to send the employees in groups of twenty per day, "We consider these employees as having unconditionally applied for employment on the date you received our registered letters along with lists of names attached thereto". With this letter an additional list of fifteen names was submitted.

On May 13, six additional names were sent.

We hold that the Union letters as to the named employees was effective notice and that the Company should have promptly reinstated them, *N.L.R.B. v. Brown & Root, Inc.*, 8 Cir. 1953, 203 F.2d. 139, 147.

The Company argues that literal compliance with the order to reinstate all employees within five days after they applied was impossible and that a good faith effort was made to reinstate as many as possible as quickly as possible. The Union submitted the names of 114 employees on April 5. By the standards which the Company sought to impose, 20 a day, these could have been taken care of in less than six full days. The list of 25 submitted on April 8 would have required only two hours beyond one day. The 15 submitted on April 22 would have required less than a day. The 6 submitted

on May 13 would have required less than half a day. So, we reject this argument.

Moreover, the requirement is that the employee be made whole. The liability for backpay therefore begins with the application for reinstatement, even if that be a date prior to the Board Order. Unfair labor practice strikers must be rehired on demand, *N.L.R.B. v. Fitzgerald Mills Corp.*, 2 Cir., 1963, 313 F.2d 260. The clear policy of the Act is to restore the situation as nearly as possible to that which would have been obtained but for the unfair labor practices, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194, to make whole those who have been deprived of a recognized interest by acts that constitute a violation of the Act, and to prevent the violator from benefiting by his misdeed. *N.L.R.B. v. Coats & Clark, Inc.*, 5 Cir., 1957, 241 F.2d 556; *N.L.R.B. v. J. H. Rutter-Rex Manufacturing Co.*, 5 Cir., 1957, 245 F.2d 594, See, also, *Florence Printing Company v. N.L.R.B.*, 4 Cir., 1967, 376 F.2d 216, cert. denied ——— U.S. ———.

We find the record well sprinkled with instances in which the Company moved at a snail's pace in the reinstatement of some of these former employees The record as a whole demonstrates that it was not impossible for the Company to comply and that as to many individuals it did not comply. Our conclusion as to the individual employee cases will be found in Part V of this opinion.

C. Inordinate delay.

The Company strongly urges, with much factual justification, that the Backpay Specifications ought to be barred by the four year delay on the part of the Board. As already pointed out, however, the Company cannot invoke laches or statutes of limitation, but this is not the end of the matter.

On November 7, 1957, following our decree granting enforcement (August 31, 1957) *counsel for the Company* wrote the Board as follows:

> "As you know, we are handling the matter of complying with the decree of the United States Court of Appeals for the Fifth Circuit, enforcing the order of the National Labor Relations Board in the subject cases. Our client has already complied with some of the provisions of the decree, and is presently engaged in bargaining with the representatives of the Amalgamated Clothing Workers of America. If any instance of a failure to fully comply with the order is brought to your attention, we would appreciate your contacting us promptly so that such corrective measures as may be necessary can be immediately taken in order to assure full compliance with the decree."

The Board minimizes the importance of this communication by citing its letter *to the Company*, dated August 21, 1957:

> "You have recently received the Decree of the Fifth Circuit Court of Appeals in the above case.
>
> "I should like to offer the assistance of this office in effecting prompt compliance with the requirements of this Decree. William W. Fox has been assigned to assist you in this connection.
>
> "Kindly advise Mr. Fox how many copies of the Notice you will need in order to comply with the terms of the Decree and he will have the required number prepared for you.
>
> "I trust that within the time specified in the Decree we will be able to report to the Board that you have taken the required action.
>
> "*When you have fully complied with the affirmative terms of the Decree and there are no violations of its negative provisions, you*

will be notified that the case has been closed. Until you receive such notice you will know that the case remains open for all purposes as awaiting compliance." [Emphasis added].

After this exchange of correspondence nothing of any consequence was said or done until March 22, 1960. On that date, a compliance examiner wrote Company counsel as follows:

"As you may know, the above-named cases have been assigned to the undersigned for the purpose of assisting the Company in complying with the Order of the Board as enforced by the Circuit Court.

"Our file indicates our last correspondence with you was in 1957, when in a September 11 letter you informed us notices were posted in the New Orleans plants of Rutter-Rex on September 10. It is presumed that notices were subsequently posted at the Franklinton plant. Will you please confirm the posting of these notices.

"An effort is being made to determine the back pay, if any, due the strikers referred to by the Board in its Order. To this end we are requesting that payroll records, social security payment records, personnel records and reports necessary to analyze the amounts of back pay due and the rights of employment of strikers be made available to us for examination and copying. We currently have before us the names of some 470 individuals for whom determinations are to be made. While this appears to be a formidable undertaking, we trust that with your cooperation it will not be too burdensome upon the Employer.

"Will you please contact us at your earliest convenience in order that we may arrange a time and place for our examination.

"We are, we realize, in the position of having delayed action in this matter over a period of several years. Under these circumstances, it

may seem inconsistent that we now urge that prompt attention be given to the request. However, the delay to date has been in a large measure due to a shortage of personnel in this office. In order that we may bring your client into compliance with the decree of the Court as soon as possible, we ask that we hear from you within the next week. Your cooperation here will be sincerely appreciated."

It was this examination of Company records, opened in 1960 and completed in 1961, which led to the Backpay Specification of November 4, 1961, now contested before this Court.

We agree that the Company could not shift or avoid its duty of compliance by asking the Board to notify it of any failures of compliance which might be brought to its attention.

On the other hand, the Company had a legal right to expect the Board to proceed with *reasonable expedition.* The Administrative Procedure Act, 5 U.S.C.A § 1005(a), *Deering Millikin, Inc. v. Johnston,* 4 Cir., 1961, 295 F.2d 856. The language of the statute then read that "* * * every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. * * *".

The Board says that the Company is not now entitled to the benefit of the statute because it made no effort to invoke it. The answer to this is that, despite its duty expeditiously to proceed, from August 31, 1957 until March 22, 1960 the Board wrote no letter and gave no notice of any kind that it contemplated moving with reference to backpay. We have already pointed out that a prior panel of this Court found the delay to have been inordinate, beyond the bounds of reason. That panel had before it the Board excuse

that it had an extremely heavy case load. We are impressed by the fact that regardless of its case load in the New Orleans area the Board knew that the Rutter-Rex dispute initially involved 600 employees and undoubtedly was one of the most important, if not the most important, compliance case pending before its Regional Office. It is admitted that the Board did have six attorneys at New Orleans. Yet, all of their attention was devoted to other cases, to the complete exclusion of this one. They let the case slide along in total inaction for almost three years after we granted enforcement and for five years after the Union abandoned the strike. Moreover, backpay was awarded through June 30, 1961, and any accruing since that date is *yet to be settled.*

In *Deering Millikin, Inc. v. Johnston, supra,* it was held that the courts have the right and the duty to enforce the requirements of the Administrative Procedure Act:

> "What is required is some balance between the interest of the Board, of the Union, and of the employer. It should be recognized, on the one hand, that the court should not interfere with any reasonable exercise of the Board's discretion in controlling the progress of the proceedings pending before it. On the other hand, adequate protection of the employer's rights should be afforded."

The fact that the Company applied for no relief until it received the notice of March 22, 1960 is not conclusive because it had a right to expect the Board to proceed with reasonable expedition and the Board did not do so. At the very least, in a fair and impartial analysis of the situation, it cannot be said that the Company was not, at least to a reasonable degree, lulled into the belief that the Board was satisfied and that no further action was to be expected.

Although we have held that mere lapse of time will not throttle the filing of backpay specifications, we also recognize the rule found in *N.L.R.B. v. Brown*, 380 U.S. 278, 291:

> "Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, Sections 10(e), (f), 29 U.S.C. Sections 160 (e), (f) (1958 ed.). Courts should be 'slow to overturn an administrative decision,' *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, but they are not left 'to sheer acceptance of the Board's conclusions,' *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests. '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co. v. Labor Board, post*, at 318."

See, for example, the decision of the Court of Appeals for the Eighth Circuit in *N.L.R.B. v. Ozark Hardwood Co.*, 282 F.2d 1 (1960), in which that court declined to enforce backpay awards that were within the letter of the law but apparently beyond the intent of Congress.

In the light of these considerations, we proceed to a determination of a "balance between the interest of the Board, of the Union, and of the employer", *Deering Millikin, Inc. v. Johnston, supra.*

A backpay proceeding is designed to enforce a public, not a private right. The purpose of a backpay award is to deter unfair labor practices and not to enforce the private rights of the employees, *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 5 Cir., 1966, 366 F. 2d 809.

Because the Company had committed unfair labor practices the burden was upon it to establish all affirmative defenses to the backpay specifications. The Board's sole burden was to prove damages, but as to any facts in mitigation the burden was on the employer, *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 5 Cir., 1966, 360 F.2d 569, 576. When dealing with 200 claims, carrying the burden of proof as to when an employee applied for reinstatement, whether the applicant was really available for work, whether there was a job available, whether a replacement should have been discharged in order to reinstate a striker, whether a discharge after reinstatement was made in good faith, whether an employee had made a bona fide effort to obtain employment elsewhere, is at best no minor task. After inordinate delay, the situation is compounded. Actually, about all the Company could do in this hearing, which ran 58 trial days, was to cross examine the claimants in an effort to establish much of its defenses.

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The proof was often so sketchy that the Trial Examiner had to strain for his findings. Repeatedly, issues were resolved solely by applying the rule as to the burden of proof. Ordinarily, we would not take a second look at this, but after inordinate delay there is occasion for concern. We do not feel that the inordinate delay barred all backpay, but some modification must be made.

Under the facts and circumstances of this case as herein enumerated, and applying the principles herein considered, this Court holds that the purposes of the Act will be vindicated, the intent of Congress will be served, and the Due Process rights of this Company will be preserved, by the enforcement of the Supplemental Order of the Board as to all backpay awarded to all employees (except those named in Part V) for any and all quarterly pay periods prior to and expiring with the end of the second quarter of the year 1959. This period covers all backpay accruing during the three years which transpired between the end of the strike and our decree of enforcement, 245 F.2d 594, and it includes all such backpay for a period of an additional two years subsequent to that decree. Considering that the employer was in the wrong in 1955 and that the Board was guilty of inordinate delay by doing nothing before March 22, 1960, we are of the opinion that backpay awards for this five year period satisfy the purposes of the law, with no injustice to the Company. We are likewise convinced that no backpay award for any period subsequent to July 1, 1959 should now or hereafter be enforced.

V

THE INDIVIDUAL CLAIMS

The bulk of the record and briefs deals with the merits or demerits of almost 200 individual claims for backpay. Upon consideration, judged by the standards applicable to each case, we find substantial support in the record for all awards except those to Amanda Bickham, Ruth Brumfield, Hazel Burns, Gloria Delpit, Vera Fulton, Indiana Plummer Gamble, Ida Haynes, Catherine Jeff (Clark), Kathleen Lodge, and Hattie Walker. Awards to these individuals will not be enforced.

CONCLUSION

Except as those employees who are found in Part V hereof to be entitled to no backpay at all, all backpay awards for any employment period prior to and ending with the close of the second quarter of the year 1959, as granted in the Supplemental Order of the Board dated June 3, 1966, are hereby ENFORCED.

In like manner, as to all backpay awards for any period of employment from and after the beginning of the third quarter of the year 1959 enforcement is DENIED.

The case is remanded to the Board for the purely mathematical task of computing the amount of backpay due each employee, consistently with what we herein hold and have hereby ordered. Since this is a matter of mathematical calculation only, no likely reason for any of the parties to seek further review in this Court is anticipated.

After thirteen years, let the books be closed on this controversy.

Enforcement GRANTED in part and in part DENIED, and REMANDED with directions.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

JUDGMENT

Before Coleman and Simpson, Circuit Judges, and Dawkins, District Judge.

The above consolidated causes were submitted to this Court upon petitions to review (Cases Nos. 23,744 and 23,909), and cross-petition for enforcement (Case No. 23,744), of a supplemental backpay order of the National Labor Relations Board dated June 3, 1966, directed against J. H. Rutter-Rex Manufacturing Company, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on December 7, 1967 and has considered the briefs and transcript of record filed in these causes. On July 23, 1968, the Court handed down its opinion denying the

petition for review filed herein by the Amalgamated Clothing Workers of America, AFL–CIO in Case No. 23,909, granting in part and denying in part the petition for review filed herein by J. H. Rutter-Rex Manufacturing Company, Inc. in Case No. 23,744 and granting in part and denying in part the cross-petition for enforcement filed herein by the National Labor Relations Board in Case No. 23,744.

In conformity with the opinion of this Court dated July 23, 1968, it is hereby

ORDERED, ADJUDGED AND DECREED that the petition for review in Case No. 23,909 be and the same is hereby denied.

It is further ORDERED, ADJUDGED AND DECREED that the petition for review filed by J. H. Rutter-Rex Manufacturing Company, Inc. in Case No. 23,744 be and the same is hereby granted in part and denied in part and that the cross-petition for enforcement filed in Case No. 23,744 by the National Labor Relations Board be and the same is hereby granted in part and denied in part, and accordingly, the supplemental backpay order of the National Labor Relations Board dated June 3, 1966 is amended by eliminating therefrom and by denying enforcement as to those portions of the order which awards backpay to any employee for any period from and after June 30, 1959, and by eliminating therefrom and denying enforcement as to those portions of the order which awards backpay to the following individuals:

Amanda Bickham
Ruth Brumfield
Hazel Burns
Gloria Delpit
Vera Fulton
Indiana Plummer Gamble

Ida Haynes
Catherine Jeff (Clark)
Kathleen Lodge
Hattie Walker

In all other respects the supplemental backpay order of the National Labor Relations Board dated June 3, 1966 is enforced.

It is further ORDERED, ADJUDGED AND DECREED that this cause be remanded to the National Labor Relations Board for the sole and limited purpose of computing the amount of backpay due each employee with respect to whom enforcement of the awards has been granted, consistent with this judgment and with the opinion of this Court dated July 23, 1968.

APPENDIX C

In the United States Court of Appeals
for the Fifth Circuit

No. 23744

J. H. RUTTER-REX MANUFACTURING COMPANY, INC., PETITIONER,

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 23909

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO, PETITIONER,

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petitions for Review (Nos. 23744 and 23909) and on Cross-Petition for Enforcement (No. 23744) of an Order of the National Labor Relations Board (Louisiana Case)

ON PETITIONS FOR REHEARING EN BANC

(October 1, 1968)

Before COLEMAN and SIMPSON, Circuit Judges, and DAWKINS, District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

APPENDIX D

158 NLRB No. 122

United States of America

Before the National Labor Relations Board

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
AND
AMALGAMATED CLOTHING WORKERS OF AMERICA,
AFL–CIO

Cases Nos. 15–CA–721, 15–CA–722

SUPPLEMENTAL DECISION AND ORDER

On February 13, 1956, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled case, in which it found that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by unlawfully prolonging a strike of its employees. The Board ordered Respondent to offer, upon application, to all those employees who went on strike on April 21, 1954, or thereafter, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary, all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reasons of the Respondent's refusal, if any, to reinstate them, from 5 days after the date

[1] *J. H. Rutter-Rex Manufacturing Company, Inc.*, 115 NLRB 388.

of their applications to the dates of Respondent's offer of reinstatement. Thereafter, on June 10, 1957, the Court of Appeals for the Fifth Circuit issued its decision granting enforcement of the Board's Order.[2]

On November 16, 1961, the Regional Director for Region 15 of the National Labor Relations Board issued a Backpay Specification and notified Respondent of its right to file an answer to the Specification within 15 days. After obtaining an extension of time to file its answer, Respondent filed a motion for an injunction in the Court of Appeals for the Fifth Circuit, seeking to enjoin the Board from proceeding further in the matter because of the lapse of time between the end of the strike and the filing of the Backpay Specification. On August 28, 1962, the Court denied Respondent's motion for a permanent injunction.[3]

Respondent filed its answer to the Backpay Specification on September 4, 1962. On October 3, 1962, Counsel for the General Counsel filed a Motion to Strike Respondent's Answer to Backpay Specification and for Judgment on the Pleadings. Respondent filed an opposition thereto. The Trial Examiner granted the General Counsel's motion in substantial part but with leave to Respondent to file an amended answer at a later date. Pursuant to notice, a hearing was held on November 13–16, 1962, before Trial Examiner Owsley Vose for the purpose of determining the validity of the method of computing backpay. At the hearing, Respondent contended that it had no obligation to reinstate any of the strikers because the Board's Order was wholly prospective in operation and that all the strikers had applied for reinstatement before the entry

[2] *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Company, Inc.*, 245 F. 2d 594. The Court entered its decree of enforcement on August 19, 1957.

[3] 305 F. 2d 242 (C.A. 5), July 19, 1962; 50 LRRM 2770.

of the Board's Order herein. The Respondent also contended that the Board's method of computation in the Backpay Specification was unreasonable. On January 23, 1963, Trial Examiner Vose issued the attached Preliminary Intermediate Report and Order in Backpay Proceeding, in which he approved the method of computing backpay set forth in the Specification, but provided that such computation should be subject to a 6 percent reduction which he found necessary in order fully to reflect the number of absences characteristic of a typical employee, and in which he rejected Respondent's argument with regard to its liability to reinstate the strikers, discussed *infra*. Thereafter, on various dates between February 12, 1963, and September 30, 1963, hearings were held on the issues raised by the Backpay Specification and the Respondent's amended answer.

On June 2, 1964, the Trial Examiner issued the attached Supplemental Decision in Backpay Proceeding, in which he ordered specific amounts of backpay to approximately 172 claimants and denied backpay to approximately 35 others. The Recommended Supplemental Order also provides for payment of simple interest at 6 percent on the backpay due for each quarter commencing from the date of his Decision. Thereafter, Respondent, General Counsel, and the Union filed exceptions to the Supplemental Decision and supporting briefs. Subsequently, Respondent also filed a motion requesting the Board to reopen the record. The General Counsel and the Union filed oppositions thereto. This motion is denied for the reasons given in our discussion below.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Preliminary Intermediate Report and the Supplemental Decision, the parties' exceptions and briefs, Respondent's Motion to Reopen the Record, and the General Counsel's and the Union's oppositions thereto, and hereby adopts the findings,[4] conclusions, and recommendations of the Trial Examiner except to the extent that they are modified below.[5]

1. Respondent's request to include in the record a copy of its letter dated March 4, 1963, directed to the Board and General Counsel, and giving reasons in support of its requests for *subpoenas duces tecum*, is granted. However, its motion to overrule the revocation of such subpoenas and to reopen the record for further cross-examination upon documents to be furnished by the General Counsel under such subpoenas is denied. In our opinion, *General Engineering, Inc.* v. *N.L.R.B.*, 341 F. 2d 367 (C.A. 9), upon which the Respondent relies in support of its motion, is not applicable to the facts of this case. In *General Engineering*, the Court emphasized that the evidence sought to be adduced by the *subpoenas duces tecum* was material and relevant to the issues in the case and that the failure of the Trial Examiner and the Board to require its production was attributable solely to observance of Section 102.118 of the Board's Rules and Regulations

[4] The Trial Examiner used the term "Respondent" instead of the term "General Counsel" in line 6, page 173, of his Supplemental Decision. We hereby correct this inadvertent error.

[5] The Respondent has requested oral argument. This request is hereby denied because the record, exceptions, and briefs adequately present the issues and the positions of the parties.

and Statements of Procedure, Series 8, as amended, revised January 1, 1965, which forbids employees of the Board from producing records and documents of the Agency without the written consent of the Board or the General Counsel. The Court there held that the Board was not entitled to rely solely upon such a provision in the Rules as justification for the withholding of relevant material to the production of which the party requesting it would otherwise be entitled. In the present case, Counsel for the General Counsel in both of his petitions to revoke specifically asserted the immateriality and irrelevancy of the evidence sought to be adduced, and, as to the items which the Trial Examiner did not require to be produced, we are convinced that Counsel for the General Counsel's objections to the irrelevancy and the immateriality of these items are well taken.

Likewise, in contrast with the *General Engineering* case, here the Trial Examiner in his rulings did not rely upon the Board Rule mentioned above. Thus, although the General Counsel in his letter of March 8, 1963, to the Respondent denied permission to representatives of the Board in New Orleans to produce any of the items listed in the *subpoenas duces tecum,* the Trial Examiner did require the production of many of the items listed in both subpoenas and they were in fact produced at the hearing. During the hearing, the Trial Examiner exhibited concern lest the Respondent be prejudiced in its cross-examination of witnesses by the General Counsel's withholding of documents under a strict interpretation of Section 102.118 of the Rules. For this reason, the Trial Examiner required the General Counsel to produce material, including affidavits, from files containing information about the claimants without regard to whether or not the claimants were called to testify. In this respect,

the Trial Examiner expressed the view that the Board's general procedural rules were not designed to cover backpay proceedings, and his conduct of the hearing was consistent with this view.

We find that the Trial Examiner's rulings with respect to the production of material sought by Respondent in its two requests for *subpoenas duces tecum* were in fact consistent with, if indeed they did not exceed the requirements of, the policy underlined by the Court in the *General Engineering* case. We are convinced, however, that insofar as the Respondent's subpoenas sought disclosure of analysis memoranda and similar memoranda and reports prepared by various agents for the Board or General Counsel in the course of their investigation of the case, the subpoenas went too far, for to have required such production would have violated rights of privacy in the "work product" of such agents under the doctrine of *Hickman* v. *Taylor,* 329 U.S. 495, 507–514. The Trial Examiner did not require the production of such material and we affirm his ruling in this respect.

2. We adopt the Trial Examiner's finding in his Preliminary Intermediate Report that Respondent had an obligation to reinstate all unfair labor practice strikers upon their unconditional application to return to work. As more fully detailed in the Preliminary Intermediate Report, Respondent contended that the Board's Order was "prospective" and that no finding of a violation of that Order can be based upon applications for reinstatement which preceded the Order itself. Hence, Respondent argues, it was under no duty to reinstate any of the employees here involved because none of them applied for, and were refused, reinstatement after the Board entered its original Order on February 13, 1956.

The Board's Order is in its usual form and is clearly drawn and intended to include a requirement for reinstatement and backpay for those employees who might already have made proper application for reinstatement at the time of the issuance of the Order. The well-established rule of law is that stated by the Court of Appeals for the Fifth Circuit in its decision granting enforcement of the Board's order, as follows: [6]

> For once the strike is an unfair labor strike, . . . or becomes such . . . the employer is compelled under the Act *to reinstate* the strikers upon application. . . . [Emphasis supplied.]

Accordingly, in agreement with the Trial Examiner and for the reasons more fully set forth in his Preliminary Intermediate Report, we find that the Board Order was retrospective in operation and required the Respondent to reemploy those employees making proper application for reinstatement, including those who made such application prior to the issuance of the Board Order.

3. Respondent contended at the hearing that its good-faith belief that some employees were guilty of serious acts of misconduct during the strike justified Respondent's refusal to reinstate them upon application. In reply to this contention, the Trail Examiner held that "[i]t is the nature and seriousness of the employees' conduct rather than the [Respondent's] belief in this regard which is determinative." In *Burnup and Sims. Inc.*,[7] the Supreme Court held that an employer's honest belief was not a defense if it affirmatively appeared that such misconduct did not in fact occur. And as more fully detailed in the Trial Examiner's Supplemental Decision, misconduct of cer-

[6] Page 598 of the Court's opinion cited at footnote 2, *supra*.
[7] 379 U.S. 21.

tain employees was not affirmatively proved in this case.

4. We find no merit in Respondent's exception to the Trial Examiner's failure to find that certain employees were guilty of misconduct during the strike. In support of its defense at the hearing, Respondent sought to introduce a 1954 judgment of a State Court which "temporarily restrained, prohibited and enjoined" the several persons named therein, including some of the claimants herein, from engaging in various and sundry acts, such as picketing respondent's premises, loitering in the vicinity of Respondent's plants and strike headquarters. The judgment also enjoined those persons named therein from, *inter alia*, engaging in threats to assault or molest employees. The Trial Examiner ruled that the judgment was not properly admissable as evidence because it fails to indicate what specific acts of misconduct are charged to any of the individuals named therein. We have examined this exhibit and, in agreement with the Trial Examiner, we find that it has no probative value because it does not attribute any specific act of misconduct to any specific individual and thus offers no assistance to us in assessing whether the acts of misconduct engaged in by any of the individuals were of sufficient gravity to warrant denial to them of reinstatement and backpay.[8]

5. The following corrections, additions, and modifi-

[8] And, in any event, assuming that the judgment was free of the inherent defects mentioned above and was otherwise material and competent, it could nevertheless not in itself control our determination of whether or not the named claimants are entitled to reinstatement and backpay. *Ferrell-Hicks Chevrolet, Inc.*, 149 NLRB No. 130, footnote 8 of the Intermediate Report and cases therein.

cations[9] are made in the Trial Examiner's findings as to individual employees.

Rose Marie Hicks

The General Counsel excepted to the Trial Examiner's award of backpay to Rose Marie Hicks for the second quarter of 1956 in the amount of $36.44. As the General Counsel notes, and we agree, the Social Security records indicate that Hicks earned an additional $88.00 during that quarter which is not reflected in her interim earnings listed by the Trial Examiner in the Appendix. Accordingly, as Hicks' total interim earnings during that period exceed the wages she would have earned if reinstated by Respondent, we shall reduce her net backpay in the amount of $36.44. Thus, the correct amount of net backpay due to Hicks is $3,519.31.

Noel Martin

We find merit, in part, in Respondent's exceptions to the Trial Examiner's award of backpay to Martin. We agree with the Trial Examiner's finding that Martin applied for reinstatement at Respondent's plant in December 1954.[10] Contrary to the Trial Examiner, however, we find that Martin is eligible for backpay only up to the beginning of 1959. Martin testified that he began to work as an apprentice bricklayer

[9] We agree with the Trial Examiner's computation and award of backpay to Shirley Edgerson. However, we find it unnecessary to pass upon, and do not adopt, the Trial Examiner's comments in Edgerson's case relating to computation by the projection forward of interim earnings during a period after she had quit a job, probably without justification.

[10] At about this same time, which was some 4 months before the end of the strike, Martin made application at one other sewing factory for work. Thereafter, apart from his pursuit of the trade of bricklaying, he made no other search for employment.

for $.75 per hour in August 1954. Four years later he completed his apprenticeship and became a "full fledged" bricklayer and began to earn the journeyman rate of $3.00 per hour. He considers himself a bricklayer since he has learned the trade, and he intends to earn his living at that trade. In view of these facts, we reject the Trial Examiner's award of backpay to Martin from 1959, when he completed his apprenticeship and achieved journeyman status, through the remainder of the backpay period covered by these proceedings. Accordingly, Martin's net backpay is reduced to $948.47.

Dorothy B. Rubit

We agree with the Trial Examiner's finding that Dorothy B. Rubit was not properly reinstated and is entitled to backpay. However, we find merit in that part of Respondent's exception which relates to the award of backpay for the second quarter of 1961. Rubit testified that she began training as a practical nurse by going to school from October 1959 until December 1960.[11] Upon completion of her training, she became a "qualified graduate practical nurse" and since January 1961 she has been steadily employed only as a practical nurse, and desires to continue in that line of work. Under these circumstances, we find that Rubit removed herself from the sewing factory labor market upon the completion of her training in December 1960.

Accordingly, we shall disallow her claim for backpay for the second quarter of 1961. Thus, her net backpay award is reduced to $3,035.92.

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[11] The General Counsel made no claim for backpay during this training period.

Dorothy P. Rubit

We find merit in Respondent's exception to the Trial Examiner's award of backpay to Dorothy P. Rubit. Rubit testified at one point that she applied for work at another sewing factory during the backpay period. However, at another point she testified that she was not sure whether she applied at the other plant during or after the strike. She did not look for other work, except at Respondent's plant. We find that her testimony, which at best is inconsistent, is insufficient to warrant a finding that she was dilligent in her search for work during the backpay period. Accordingly, we find that she incurred a willful loss of earnings and is not entitled to any backpay.

Mignonette Thomas

We find merit in Respondent's exceptions to the Trial Examiner's award of backpay to Thomas for the first two quarters of 1956. We affirm, however, his finding that Thomas was entitled to backpay from August 5, 1955, to December 31, 1955.

The General Counsel concedes and the record shows that because of an illness requiring surgery, Thomas was not available for work and did not look for work during the entire first quarter of 1956 and up to June 1, 1956, of the second quarter.

We find therefore that Thomas is not entitled to backpay for the first and second quarters of 1956. Accordingly, her backpay is reduced to $608.37.

Herbert Lotten

We find merit, in part, in Respondent's exceptions to the Trial Examiner's finding with respect to Lotten. The record shows that Lotten secured a job in a cleaning business owned by his father-in-law sometime during the strike and continued at this job throughout the entire backpay period. In a conversa-

tion with Lotten, apparently before the end of the strike, Batiste, a good friend and his supervisor, asked Lotten if he was interested in returning to his old job. Lotten refused because he was satisfied with his job. Shortly thereafter, Lotten became dissatisfied, because he had a disagreement with his father-in-law, and asked to be reinstated; and in November 1955, he filed an application with Respondent but he was not reinstated. According to Lotten's own testimony, he informed Batiste, sometime after the end of the strike, that he had patched things up with his father-in-law and was not then interested in having his old job back. Respondent introduced into evidence a memorandum indicating that Lotten had been sent for in June 1957 but he told Batiste that he was not interested—that he was working for his father-in-law. In view of Lotten's admission that he rejected an offer of reinstatement after the strike was over, a fact which is corroborated by Respondent's memorandum, and there being no other evidence to fix the date of such refusal, we find that Lotten's backpay should be terminated in June 1957. Accordingly, we find that Lotten is entitled to backpay only for the first, second, and third quarters of 1956 and the second quarter of 1957 in the total amount of $153.05.

Bessie Montgomery

We agree with the Trial Examiner's finding that Montgomery willfully incurred a loss of earnings by quitting a job in the second quarter of 1959, and that this continued until she renewed her search for work in the second quarter of 1960. However, in his conclusion, the Trial Examiner stated that "no willful loss of earnings has been proven." We hereby correct this inadvertent error.

We agree with the Trial Examiner's finding that Montgomery is entitled to backpay in the amount of $1,152.82.

Marjorie Walker

We overrule Respondent's exception to the Trial Examiner's award of backpay to Walker for the following reasons. The Specification alleged, and Respondent conceded, that Walker applied for reinstatement on March 22, 1955. In its amended answer, Respondent contended that it did not reinstate Walker because she failed to apply *after* the strike. The Trial Examiner found, and we agree, that a reinstatement application made by an unfair labor practice striker during the strike creates an obligation upon Respondent which can be terminated only by an unconditional offer of reinstatement. The Respondent further contended, however, that Walker had left its employ prior to the beginning of the strike. Walker testified that because she was pregnant, her last employment with Respondent was "approximately 2 or 3 weeks" before the strike. Prior to her leaving, she discussed the possibility of returning to work after her baby was born with the lady who "was over" her. Her baby was born in May 1954. About 6 weeks after her baby was born, she went on picket duty with the Union, outside of Respondent's plant. The record shows a general pattern among the female employees of leaving Respondent's employ because of pregnancy, illness, etc., and later returning to work. It is therefore clear, under the circumstances, that Walker remained an employee of the Respondent and is entitled to backpay in this proceeding. Moreover, Respondent's contention, raised for the first time in its exceptions to the Trial Examiner's Supplemental Decision, that Walker was not working for Respondent at the time of the strike is

without merit as it was not alleged in Respondent's amended answer as a defense. Accordingly, we find that Walker was an employee of the Respondent who became a striker and is entitled to reinstatement. She is entitled to backpay in the amount of $2,639.56 as found by the Trial Examiner.

Bessie Brown (Harris)

We agree with the Trial Examiner's finding that Brown is entitled to backpay. We find merit, however, in the General Counsel's exception to the Trial Examiner's failure to award backpay to Brown for the third quarter of 1955 after finding that her backpay period ended on July 18, 1955. The General Counsel alleges that Brown is entitled to an additional sum in the amount of $58.56, for the period from July 1 to July 18, 1955. This appears to be an inadvertent error by the Trial Examiner and accordingly Brown's backpay is increased by that amount. We find that the total backpay due her is $124.88.

Marguerite Head
Audrey Zeno

We find merit in the General Counsel's exceptions to the Trial Examiner's refusal to allow amendments to the Specification to extend the backpay period for Head and Zeno. The Specification alleged that Head was offered reinstatement on May 15, 1955, and that Zeno was offered reinstatement on June 9, 1955. In its amended answer, Respondent admitted that reinstatement was offered on July 18, 1955, and July 12, 1955, to Head and Zeno, respectively. The cases of these two claimants are distinguishable from other cases discussed by the Trial Examiner in his Supplemental Decision wherein he refused to allow either party to amend, because, unlike other motions to amend the Specification, the present motion is based upon the

written admission of the Respondent. We shall therefore amend their schedule to reflect the total backpay due for the period from April 14, 1955, to July 18, 1955, for Head and from April 14, 1955, to July 12, 1955, for Zeno, in the following tables.

Marguerite Head's Backpay

Year	Period	Quarter	Gross Backpay [1]	Interim Earnings	Net Backpay
1955	Apr. 14, 1955 to June 30, 1955	II	$312.47	0	$312.47
1955	Bonus	II	23.61		23.61
1955	July 1, 1955 to July 18, 1955	III	66.99	0	66.99
Total 1955					403.07

Audrey Zeno's Backpay

1955	Apr. 14, 1955 to June 30, 1955	II	$312.47	$58.86	$253.61
1955	Bonus	II	23.61		23.61
1955	July 1, 1955 to July 12, 1955	III	42.55	34.86	7.69
Total 1955					284.91

[1] The 6 percent adjustment computed by the Trial Examiner is included in our computation of gross backpay.

Accordingly, we find that Head and Zeno are entitled to $403.07 and $284.91, respectively.

Genevieve Green (Hilliard)

We find merit in the General Counsel's exception to the Trial Examiner's failure to award backpay to Green for the fourth quarter of 1955. The Trial Examiner found, and we agree, that Green made application and was refused reinstatement on November 9, 1955, and that her backpay period began on November 17, 1955. The Trial Examiner also found that Green searched unsuccessfully for work during the remainder of this quarter but he failed to include this period in computing net backpay. Accordingly, we shall amend her schedule to include backpay for the fourth quarter of 1955.

The Specification indicates that if Green was reinstated and had continued to work for the remainder

of the quarter, her earnings would have been according to the following computation:

Genevieve Green's (Hilliard) Backpay

Year	Period	Quarter	Gross Backpay [2]	Interim Earnings	Net Backpay
1955	Nov. 17, 1955 to Dec. 31, 1955	IV	$192.03	0	$192.03

[2] The 6 percent adjustment recommended by the Trial Examiner is included in our recomputation of gross backpay.

Accordingly, we find that Green is entitled to an additional $192.03, which, added to the $79.25 for the second quarter of 1956, amounts to $271.28 in backpay.

Marietta Newman

We find merit in the General Counsel's exception to the Trial Examiner's failure to award backpay to Newman from July 1, 1957, to July 20, 1957. The Trial Examiner found, and we agree, that Newman was employed as a nurse from October 1955 until July 20, 1957. During this period, she worked 3 days per week at $6.00 a day. The Specification indicates that had she worked for Respondent during this 3-week period in July 1957, she would have earned $101.70. Her interim earnings of $54.00 deducted from what she would have earned if reinstated by the Respondent entitled her to an additional amount of $47.70 in backpay. Accordingly, we find that Newman is entitled to $1,614.00 in backpay.

Eunice Johnson

We find merit in the Union's exception to the Trial Examiner's failure to award backpay to Johnson for the first quarter of 1960. We do, however, concur in the Trial Examiner's remaining findings with respect to Johnson.

In his brief to the Trial Examiner, the General Counsel requested that backpay be eliminated for a "period when [Johnson] was unable to work because

of her mother's illness." The Trial Examiner interpreted this as a request to eliminate backpay for the entire first quarter of 1960. The record shows, however, that Johnson worked for one employer for the first 2 months of this quarter before quitting because of illness in her family. However, the record further shows that Johnson was only idle for one week during this quarter before starting to work for another employer, where she remained employed until some time in the second quarter. The Social Security records indicate that for the first quarter of 1960 she had interim earnings in the amount of $172.81 while working for both employers.

We note that several other claimants in the same category as Johnson would have earned $470.56, including the 6 percent adjustment, during this quarter if they had been reinstated by Respondent (see numbers 101, 102, 116, and 149 in the Appendix to the Trial Examiner's Supplemental Decision). However, we find also that Johnson incurred a willful loss of earnings for 1 week by quitting one job during the quarter before being reemployed at another job for the remainder of the quarter. The Specification indicates that had she worked for Respondent during that week, she would have earned a total of $34.47, including the 6 percent adjustment computed by the Trial Examiner. Thus, we shall deduct that amount from the $470.65, leaving $440.09. Since we have found that her interim earnings amounted to $171.81, her net backpay for this period is $440.09 less $172.81, or $267.28. Accordingly, we shall add this amount to the $5,386.11, found by the Trial Examiner, making the total amount of backpay due $5,653.39.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding as net backpay the amounts, including interest from the date of the Trial Examiner's Supplemental Decision, but minus the tax withholding required by Federal and State laws, set forth opposite their names in the Appendix to the Trial Examiner's Supplemental Decision, except for the individuals named below who shall be paid the following amounts, set opposite their names.

Rose Marie Hicks	$3,519.31	Bessie Brown (Harris)	$124.80
Noel Martin	948.47	Marguerite Head	403.07
Dorothy B. Rubit	3,035.92	Audrey Zeno	284.91
Dorothy P. Rubit	None	Genevieve Green (Hilliard)	271.28
Mignonette Thomas	608.37	Marietta Newman	1,614.00
Herbert Lotten	153.05	Eunice Johnson	5,653.30

With respect to those employees whose backpay was still accruing, as found by the Trial Examiner in his Supplemental Decision, payment to them of the net amount found to be due and accruing constitutes satisfaction of Respondent's obligation only up to June 24, 1961, which is the end of the period covered by the Specification.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman,

JOHN H. FANNING,
Member,

HOWARD JENKINS, JR.,
Member,

[SEAL] *National Labor Relations Board.*

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D.C.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
and
AMALGAMATED CLOTHING WORKERS OF AMERICA,
Cases Nos. 15–CA–721, 15–CA–723 AFL–CIO

John H. Hector, Edward A. Champagne, and *Louis A. Fuselier,* of New Orleans, La., for the General Counsel.

Brown, Herman, Scott & Young, of Fort Worth, Tex., and *Montgomery, Barnett, Brown and Read,* of New Orleans, La., by *Henry J. Read* and *Peter H. Beer,* for the Repondent.

Ralph N. Jackson, of New Orleans, La., for the Amalgamated Clothing Workers of America, AFL–CIO.

Before: *Owsley Vose,* Trial Examiner.

PRELIMINARY INTERMEDIATE REPORT AND ORDER IN BACKPAY PROCEEDING

Statement of the Proceedings

The National Labor Relations Board on February 13, 1956, issued its Decision and Order directing, *inter alia,* the Respondent, J. H. Rutter-Rex Manufacturing Company, Inc., upon application, to offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went out on strike on April 21, 1954, or thereafter, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired on or after that date, and to make such

applicants whole for any loss of pay suffered during the period from 5 days after the date of their applications for reinstatement, to the date of the Respondent's offer of reinstatement. The United States Court of Appeals for the Fifth Circuit rendered its opinion enforcing the Board's Order on June 10, 1957 (245 F. 2d 594), and on August 19, 1957, entered its Decree in conformity therewith.

Thereafter, on November 16, 1961, the Board, by its Regional Director at New Orleans, issued a Backpay Specification setting forth the specific amounts of gross and net backpay due each of 207 striking employees who allegedly had applied for reinstatement, and notifying the Respondent that a hearing was scheduled to be held on January 29, 1962, and further notifying the Respondent of its right to file an answer to the Specification within 15 days pursuant to Section 102.54 of the Board's Rules and Regulations.

After obtaining an extension of time for filing its answer until January 4, 1962, the Respondent, on December 30, 1961, filed an *ex parte* application with the Court of Appeals for the Fifth Circuit to enjoin the Board from conducting this backpay proceeding because of its delays in the matter. The Court, after issuing an order temporarily staying the proceedings, on July 19, 1962, issued its opinion declining permanently to stay these proceedings. On August 28, 1962, the Court, in conformity with its opinion, issued its decree dissolving the temporary stay of the proceedings previously issued by it and denying Respondent's motion for a permanent stay.

Thereafter, on September 4, 1962, the Respondent filed an answer to the Backpay Specification. On September 20, 1962, the Regional Director issued an order rescheduling the hearing for November 13, 1962. On October 3, 1962, counsel for the General Counsel filed

with the Regional Director a Motion to Strike the Respondent's Answer to Backpay Specification and for Judgment on the Pleadings. The aforesaid Motion was referred to the undersigned Trial Examiner for ruling. After considering the aforesaid Motion, the General Counsel's Argument in support thereof dated October 29, 1962, and the Respondent's Opposition thereto dated October 30, 1962, the undersigned Trial Examiner on November 5, 1962, issued his opinion and order granting the General Counsel's Motion to Strike the Respondent's answer in substantial part, with leave to the Respondent to file an amended answer at a date later to be set by the Trial Examiner, and notifying the parties that the hearing scheduled for November 13, 1962, would be confined to the issue of the method of computation to be used in computing the amount, if any, of backpay due in this case, and related preliminary issues of law and fact.

The proceeding was heard in New Orleans on November 13–16, 1962. Evidence was received from all parties on the issue of the method of computation to be used in this case. At the hearing the parties were invited to submit suggestions as to the appropriate procedure to be followed thereafter in the case in resolving the extremely numerous factual issues involved herein. After the hearing, which was participated in by all parties, the Respondent on December 10, 1962, filed a memorandum in which it opposed the method of computation adopted in the Backpay Specification. The General Counsel filed a memorandum supporting the Specification on December 21, 1962, and the Amalgamated Clothing Workers of America, AFL–CIO, filed a memorandum on December 26, 1962.

I. The Questions Involved

The first question to be decided in this proceeding is whether the Respondent has any obligation to reinstate the striking employees here involved, all of them allegedly having applied for reinstatement before the entry of the Board's Order herein, and none of them, so far as the record shows, having reapplied thereafter. The Respondent, asserting that the Board's Order is wholly prospective in operation, contends that this question should be answered in the negative.

The second question, assuming that the answer to the first question is in the affirmative, concerns the reasonableness of the method of computation used in the Backpay Specification. It is settled that in making backpay determinations, the Board may adopt formulas reasonably designed to produce an approximation of the amount of backpay due and that such formulas should be upheld unless arbitrary or unreasonable in the circumstances involved. *W. C. Nabors Co.*, 134 NLRB 1078, 1084–1085; *N.L.R.B.* v. *Ozark Hardwood Co.*, 282 F. 2d 1, 7 (C.A. 8); *N.L.R.B.* v. *Brown & Root, Inc.*, 52 LRRM 2115, 2117–2118, decided January 4, 1963 (C.A. 8); *N.L.R.B.* v. *East Texas Steel Castings Co.*, 255 F. 2d 284 (C.A. 5). The Respondent, while not challenging the use of a reasonable formula, contends that the method contained in the Specification is unreasonable.

The Specification, in broad terms, adopts the average biweekly earnings of control groups of employees, selected primarily because they worked most of the time during the backpay period, as giving the measure of what the employees in the various classifications would have earned during each biweekly period in the backpay period. The Respondent does not object to the use of the average earnings of a control group of em-

ployees to provide the measure of the backpay due the striking employees here involved. As discussed more fully below, what the Respondent objects to is that the earnings of additional short-term employees were not taken into consideration in computing the average, and that the average is computed on a biweekly rather than an annual or a quarterly basis. The Respondent contends that the method of selecting the control groups used in the Specification resulted for the most part in the inclusion of only its better operators which has the effect of raising the average earnings. The Respondent asserts further that the biweekly method fails to reflect the extent that the average employee's annual earnings were reduced by absences of 2 weeks or more and thus overstates what the employees here involved actually would have earned in the Respondent's employ during the backpay period. The Respondent suggests as an alternative to the biweekly method of obtaining the averages that earnings be averaged on an annual basis or at least on a quarterly basis.

II. The Respondent's obligation to reinstate the striking employees with backpay

As indicated above, the Respondent contends that it is under no duty to reinstate any of the employees here involved for the reason that none of them was refused reinstatement after the entry of the Board's Order herein, which the Respondent asserts is wholly prospective in operation. As to some of the employees (an unspecified number), the Respondent asserts that it has additional grounds for claiming that it is not in disobedience of the reinstatement and backpay provisions of the Board's Order, such as that they failed to make bona fide applications for reinstatement or that they were in fact reinstated within a reasonable time after jobs became available. The Respondent as-

serts that if its contentions that none of the employees here involved is entitled to reinstatement are sustained, this will obviate the need for any further hearing to inquire into the specific amounts of backpay due individual employees. Accordingly, the Respondent requests that a further preliminary hearing be held on the question of the employees' entitlement to reinstatement.

The principal ground upon which the Respondent relies in support of its contention that it has fully satisfied its reinstatement and backpay obligation under the Board's Order is that the reinstatement and backpay provisions of the Board's Order are prospective in operation only, and that no finding of a violation of the Board's Order can be based upon "applications for reinstatement, which precede the order itself." [12] In other words, the Respondent is contending that any application for reinstatement made prior to the entry of the Board's on February 13, 1956, was premature and did not create any liability on its part to reinstate such an applicant. Since the Specification alleges that each of the employees here involved made application for reinstatement prior to February 13, 1956, this contention, if sustained would eliminate all backpay in this case.

I find no merit in this contention. It ignores the fundamental and long settled legal proposition that the Board, in the exercise of its power to remedy unfair labor practices, may require the discharge of employees hired to replace unfair labor practice strikers where necessary to make room for the stikers who apply for reinstatement. The Board is one of its early decisions involving, as here, a strike caused by a refusal to bargain, stated that it was providing for this

[12] This is a quotation from p. 20 of the Respondent's memorandum to the Trial Examiner.

remedy "In order to restore the status quo as it existed prior to the time the Respondent committed the unfair labor practices and in order to enable the processes of collective bargaining to function." *Black Diamond Steamship Corp.*, 3 NLRB 84, 93. The Court of Appeals for the Second Circuit affirmed, stating that "From the date of the Respondent's first unfair labor practice, its ordinary right to select its employees became vulnerable. Accordingly, it was proper for the Board to order it to discharge all engineers hired for the first time since December 14, 1936 [the date of the fist refusal to bargain]" *Black Diamond Steamship Corp.* v. *N.L.R.B.*, 94 F. 2d 875, 879, certiorari denied, 304 U.S. 579.

This decision makes it clear that the duty to reinstate, which flows from the Board's determination that the reinstatement of unfair labor practice strikers, upon application, is an appropriate means of remedying the unfair labor practice causing the strike, comes into being when the unfair labor practice is committed and continues until the unfair labor practice is remedied. Indeed, only by requiring the reinstatement of unfair labor practice strikers upon their giving up the strike and seeking to go back to work can the Board accomplish its objective in such situations of "restor[ing] the status quo" and enabl[ing] the process of collective bargaining to function."

Since the time of the *Black Diamond* decision the Board and the courts have uniformly upheld the right of unfair labor practice strikers to reinstatement, upon application, whether they apply before the entry of the Board's Order or not. See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278 and cases cited in footnote 9 thereof. The decision of the Court of Appeals in the instant case when it was before the court upon the Board's petition or enforcement of its

order gave full recognition to this basic proposition when it stated (245 F. 2d 594), that "the employer is compelled under the Act, to reinstate strikers upon application even though it means discharging replacements hired during the strike." It would appear that an employer would not be under a duty to discharge replacements unless the unfair labor practice strikers had a right to reinstatement at the time the replacements were hired. This duty, as stated above, flows from the employer's duty to remedy the unfair labor practice causing the strike, and does not come into being upon the issuance of the Board's Order of reinstatement, as the Respondent argues.

The Respondent asserts that all the cases of which it is aware dealing with the reinstatement of unfair labor practice strikers involved allegations and findings of violations of Section 8(a)(3), and suggests that a different rule should apply in this case which involves reinstatement and backpay provisions which were ordered to remedy a refusal to bargain in violation of Section 8(a)(5).[13] The Respondent's distinction, in my opinion, is without merit. The underlying right to reinstatement of the strikers involved in all those cases stemmed from the fact that the Board has determined that the appropriate remedy in situations involving strikes caused by unfair labor practices is to require the reinstatement of the strikers, upon application. In none of the cases to which the Respondent refers were the Section 8(a)(3) violations established in the manner in which such allegations normally are,

[13] For a Board decision which makes it clear in a Section 8(a)(5) strike situation that the obligation to reinstate the strikers upon application antedates the entry of the Board's Order, see *Washingon Coca-Cola Bottling Works*, 122 NLRB 7, 8–9. See also *DuBois Chemicals, Inc.*, 140 NLRB No. 29, decided December 13, 1962.

i.e., by proving the antiunion motivation behind each refusal to reinstate. Rather, the only questions litigated were whether the strike was an unfair labor practice strike and whether the strikers had applied for, and had been denied, reinstatement. Thus, the reinstatement with backpay of the strikers involved in those cases was attributable not to the fact that they had been denied reinstatement for antiunion reasons, in violation of Section 8(a)(3), but to the circumstance that they had been forced out on strike by unfair labor practices and that their reinstatement was essential to remedy these unfair labor practices.[14] The fact that a violation of Section 8(a)(3) of the Act was found in these cases does not affect the applicability of this basic principle to this case. Such a finding was made in those cases only because the applications for reinstatement had been made prior to the hearing and the Board had an opportunity to pass upon the propriety of the applications. The Respondent will have an opportunity to present its remaining contentions concerning the validity of the employees' applications at the forthcoming hearing in this case. For the foregoing reasons I conclude that the absence of Section 8(a)(3) allegations in this case is immaterial and that the Respondent's contention that the Board's Order operates prospectively, only, must be rejected. The Respondent's request for a further preliminary hearing in this case is therefore denied.

[14] I have considered *Republic Steel Corp.* v. *N.L.R.B.*, 114 F. 2d 820, 821 (C.A. 3) and *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, upon which the Respondent also relies, and concludes that neither of these decisions calls for a contrary result in this case.

III. The Reasonableness of the Board's Method of Computation

A. *Introductory statement*

The Backpay Specification states for each employee the various items involved in computing the net backpay due him. The principal item is gross backpay which is the term used to refer to the sum of money which an employee would normally have earned had he been on the Respondent's payroll during the backpay period. The backpay period is the period commencing 5 days after the employee made an unconditional application for reinstatement and continuing until the employee was offered reinstatement. The Specification alleges the dates on which each of the 207 employees here involved made an application for reinstatement. As of July 8, 1961, the end of the period covered by the Specification about 137 employees had been reinstated by the Respondent, and the rest had not. In this case gross backpay for each employee includes not only the sum of the average biweekly wage in the appropriate job classification for each biweekly period in the entire backpay period, determined as described below, but also, where applicable, such additional sums as an employee would have received under the Respondent's vacation bonus plan. Since the Respondent does not contest the method utilized by the Board to determine such bonus payments, this aspect of the computation will not be discussed further in this report.

Other items covered in the Specification are the employees' interim earnings from other employers or from self-employment during the backpay period and their unusual expenses incurred in obtaining and holding such interim employment. As set forth in the

Specification, interim earnings minus the unusual expenses incurred in obtaining and holding such employment constitute net interim earnings.

It should be noted that although the Specification contains figures as to the interim earnings of the employees here involved, the Respondent has the burden of proof with respect to interim earnings or any other items which go to mitigation of the amount of backpay due. The Board includes allegations concerning interim earnings in Backpay Specifications as a public service because of its belief that it is better equipped to ascertain such matters than the average employer or other person charged with unfair labor practices. But the Board, by including such allegations as to interim earnings in the Specification, does not assume any responsibility for establishing the fact that the employees had such earnings. It merely sets forth the results of its investigation of such matters for the benefit of the employer, and admits that the gross backpay due each employee may be reduced by the amount of the net interim earnings set forth for each employee in the Specification. See *N.L.R.B.* v. *Brown & Root, Inc.*, 52 LRRM 2115, 2120, decided January 4, 1963 (C.A. 8).

The final item covered in the Specification is net backpay, which is simply an arithmetical computation of the difference between an employee's gross backpay and his net interim earnings.

B. *The Board's Method of Computation* [15]

Explanation of the method of computation adopted in the Specification is necessarily somewhat complicated. It perhaps may best be understood if set out on a step-by-step basis. The first step taken was to divide

[15] For convenience, the method of computing backpay incorporated in the Specification is referred as the Board's method

the employees into five categories according to the operations performed by them immediately before the strike. The first four categories consist solely of male employees who are divided into separate groups according to their respective operations, as follows: (1) cutters, spreaders and clicking machine operators, (2) porters, (3) utility employees, and (4) truckdrivers, and warehouse utility employees. The fifth category of employees consists of female production employees which include the great bulk of the Respondent's employees. These are mainly sewing machine operators, pressers, etc. In the Specification, the same method of computation of the gross backpay was used for the seven employees in the first four groups. A slightly different method was used to compute the gross backpay of the employees in the fifth group.

As to the seven employees in the first four groups, the Board ascertained from the Respondent's records the average biweekly earnings of a control group of employees who were employed during the backpay period for 6 months or longer in each of the four operations or classifications involved. The resulting average biweekly earnings figure was taken as the measure of what the employees in each of these four classifications would have earned during each biweekly period in the backpay period.

As to the employees in Group 5, the female operators, the Specification adopted the average biweekly earnings of another control group of employees as giving the measure of what these employees would have earned during the same biweekly periods. The control group for this group consisted both of older

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of computation, although, in accordance with the usual procedure, the Specification was prepared by employees under the supervision of the General Counsel in the New Orleans Regional Office of the Board.

employees who worked for the Respondent, before, during, and after the strike (although not necessarily without interruption), called the incumbent group, and a second group consisting of employees who for the most part had not been on the Respondent's payroll before, called the replacement group. Included in the incumbent group were all employees who were employed by the Respondent during the first quarter of 1954 (before the strike), the third quarter of 1954 (during the strike), and the first quarter of 1961 (long after the strike). Included in the replacement group were all those hired by the Respondent between the time the strike began (April 21, 1954) and the end of 1955 and who were also working for the Respondent in the first quarter of 1961. The total control group which was used to ascertain the measure of backpay of the employees in Group 5 consisted of 95 incumbents and 64 replacements.

The Specification sets forth the wages received by each of the 159 employees in the control group during each of the biweekly pay periods in the backpay period. If any of these 159 employees did not work at all during a biweekly period they were excluded in determining the average weekly wage in that period. However, if any one of the 159 employees worked as much as an hour within the 2-week period, their wages were included in computing the average biweekly wage for that period. The total gross backpay for each of the employees in Group 5, as stated in the Specification, was the arithmetical total of the average biweekly wages for each biweekly period in the backpay period.

C. *The Respondent's Objections to the Board's Method of Computation; Its Alternate Proposals; Conclusions*

The Respondent raises various objections to the Board's method of computation, some of which are common to the employees in all five groups. The Respondent makes other objections which are applicable only to specific groups. Since Group 5 (the female operators) contains all but seven of the employees with whom we are here concerned, these objections, together with the objections which are common to all groups, will be considered first.

1. The Group 5 employees

As noted above, the Respondent contends that the Board's method of selecting the control group of employees to furnish the measure of what the Group 5 employees would have earned resulted in including only the most experienced and productive operators, and therefore the operators with the best earnings. As stated above, the Board included among the incumbents only those who were on the Respondent's payrolls during the first and third quarters of 1954 and the first quarter of 1961. The replacement portion of the control group included those who were hired between April 21, 1954, and December 31, 1955, and who were also on the payroll during the first quarter of 1961. While this method of selection resulted in long-term employees largely used to give the measure of gross backpay of the employees here involved, such a method was dictated by the law of the case. The Board, with court approval, has held that the striking employees are entitled to backpay commencing within 5 days after any refusal of their unconditional application for reinstatement and ending when they are

offered reinstatement. According to the allegations of the Specification, the applications of some 70 of the employees here involved have never been granted. Under the law, it is presumed as to all employees whose applications for reinstatement were turned down that they would have remained on the payroll for the entire backpay period since it was the Respondent's failure to remedy the unfair labor practices causing the strike which made it impossible to determine how long these employees would have remained on the Respondent's payroll. To furnish the fair measure of the earnings such employees would have had during the long backpay period it was therefore necessary to take the earnings of long-term employees into consideration.

Recognizing that among the employees here involved were a comparative few, about 20, who were learners and who only had a short period of employment with the Respondent before the strike, the Board included among the control group for the operators, the replacements—employees who, generally speaking, were new to the Respondent's employ—and whose earnings could be expected to lower the average of the entire control group. That this is in fact true is demonstrated by General Counsel's Exhibit 2 which is a graphic presentation of what the figures in the Specification show with respect to the average quarterly earnings of all the replacement and incumbent employees. This exhibit shows that the replacements consistently earned less than the incumbents throughout the backpay period, but that the gap in their earnings, which amounted to almost $100 per quarter at the start of the backpay period, steadily narrowed during the backpay period until at the end of the backpay period, the gap was between $20 and $25.

It is true, as the Respondent points out, that some of the operators included among the replacements were experienced employees who were not on the pre-strike payroll and who were rehired during the strike. However, as Compliance Officer Jones credibly testified, his examination of the Respondent's records showed that there were many more learners among the replacement group than there were among the striking employees here involved. In my opinion, the Specification adequately takes into account the fact that a small number of the employees here involved were relatively new employees at the time of the strike.

The Respondent's other principal objection to the Board's method of computation for the Group 5 operators is to the averaging of earnings on a biweekly basis. The Respondent asserts that this method of averaging earnings fails to reflect the extent to which a typical employee's annual earnings are reduced by absences of more than 2 weeks at a time. The Board's method takes into account absences of up to 2 weeks, for an employee is counted in computing the average if he had any earnings at all in a 2-week period. The low biweekly earnings set forth in the Specification for many employees, including one as low as 73 cents, shows that the Board's method fully takes into consideration absences of up to 2 weeks.

With regard to absences of 2 weeks or longer, Eugene J. Rutter, the president of the Respondent, testified that it would be the exceptional case where an employee worked for 5 or 6 years without interruptions. He testified further that it was common for the employment of the operators to be interrupted because of pregnancy, operations, illness, either their own or that of someone in their family, or because of business problems, such as leaving town to settle an estate. Ex-

amination of Appendix E–1 of the Specification which sets forth the earnings of the incumbents and replacements in each of the biweekly periods in the backpay period shows sufficient blanks for 1 or more biweekly periods (a blank reflects no earnings and therefore an absence) to confirm President Rutter's testimony that such absences are not uncommon.

The General Counsel points out that in Part III of the Specification dealing with net backpay, allowance has been made for absences longer than 2 weeks by excepting from the period for which backpay is claimed various periods of time during which the employee was unavailable for employment for various reasons, such as "attending school," "pregnant," "illness," and "vacation." Part III shows numerous excepted periods for reasons of pregnancy and illness. The General Counsel urges that these excepted periods adequately compensate for the failure of the biweekly method to take into consideration absences of more than 2 weeks at a time. This contention will be disposed of later, after the discussion of the Respondent's proposals as to a fair method of computing backpay in this case.

As an alternative to the biweekly method of computation adopted in the Specification, the Respondent in its memorandum proposes first that the earnings of all employees who worked for it any time during a year in the classifications included in Groups 1–5 should be averaged by classifications on an annual basis. The resulting figure for any given year would be taken as representing what the employees here involved in that particular classification would have earned during that year's portion of the backpay period. Alternatively, the Respondent proposes that the earnings of all the employees in the particular classification involved be averaged on a quarterly basis.

The Respondent shows that checks of its records disclose considerable disparity between the figures reached using the Board's method of computation and those reached under its annual or quarterly methods of computation. One check made for the year 1956, revealed annual average earnings of $1,491.47 as compared with $1,788.36 under the Board's biweekly basis, including sums for the vacation bonus. The Respondent checked the average earnings of all its operators by quarters and found with respect to the 3rd quarter of 1955, an average of $340.31 as compared with the figure of $410 which was reached by the Board using its biweekly method of computation. For the 3rd quarter of 1957, the Respondent's figure reached by averaging the quarterly earnings of all the employees who did any work during the quarter was $391.63. The Board's comparable figure was $449.21.

It thus appears that there is a considerable difference in the results between the figures reached using the Board's biweekly method and the figures obtained by using the Respondent's annual or quarterly methods. However, in view of the facts set forth below I do not believe that either of the Respondent's proposed methods give the fair measure of the gross backpay due the employees here involved. As President Rutter testified, because of "turnover, discharges, quits, leaves of absence" it is necessary for the Respondent regularly to hire new employees and rehire former employees. Otherwise according to Rutter, "your factory will dwindle; you just won't make the production you are supposed to make for the number of machines you have." To solve this problem, the Respondent operates a training program continuously, and all employees hired, except those having previous experience in its factory, are put through this training program. In the training period, the Respondent culls out a number

of newly hired employees who are unable to make satisfactory progress in the training program. Under the Respondent's proposed annual method of computation the annual earnings of these culled out employees, and also of those who quit the Respondent's employ after working only a short time, are included in computing the annual average earnings. In addition, although the Respondent because of turnover may have to hire as many as three or even more employees in the course of a year to keep one sewing machine regularly in operation, the part-year earnings of all three employees are included as full year earnings of each employee under the Respondent's proposed annual average formula.

Since the problem in this proceeding is to ascertain the measure of earnings of employees who presumably worked as steadily as the Respondent's regular employees customarily worked during the various years of the backpay period, there is no reason whatever to take into consideration in the part-year earnings of the numerous employees who are called out or quit during the training period or who quit for any other reason during the year. Nor is there logical basis to include in computing the annual average the part-year earnings of all those hired to replace the employees who are discharged or quit during the year. The inclusion in the average of the part-year earnings of all such employees, some of whom worked only a few weeks during the year, greatly reduces the annual average, and the result is not at all representative of what the employees here involved would have earned each year during the backpay period. For these reasons I conclude that the annual basis of computation proposed by the Respondent does not give a fair measure of what the employees here involved would

have earned during the backpay period. Accordingly, this proposal is rejected.

The Respondent's proposed quarterly earnings method of computation is subject to the same defects as its annual earnings proposal except to a much lesser degree. However, in my opinion, these defects result in a sufficiently serious understatement of the earnings of the employees here involved to preclude the acceptance of this method of computation. As indicated above, it is not an infrequent occurrence for employees to leave the Respondent's employ after working a week or two. As President Rutter testified, in a plant the size of Respondent's it is impossible to hire a sufficient number of experienced employees to make up for normal turnover. Consequently, it regularly has to hire persons without experience who may or may not develop into experienced operators in its training program. The inclusion in the quarterly average of the earnings of employes who are culled out or quit after working but a week or two in a quarter is bound to pull down the average to an extent where it cannot be said to be fairly representative of the earnings of a group who are presumed to work throughout the quarter. For this reason, I am impelled to reject the Respondent's quarterly earnings proposal.

However, I am not satisfied that the Board's biweekly method of computation, although it reflects absences of less than 2 weeks and also longer absences because of pregnancy etc., fully takes into consideration all of the absences that a typical employee has during a normal year. The Respondent points out in its memorandum, and the General Counsel does not challenge this assertion, that 80 percent of the 159 of the incumbent and replacement employees used as the control group for the operators in Group 5 earned less in the backpay period than the sum which is the total of the

biweekly figures for each of the 2-week periods covered in the Specification. Since the Specification itself shows that absences of 3 or 4 weeks are not uncommon,[16] it appears that the failure of the earnings of this high percentage of the employees in the control group for the operators to come up to the total indicated in the Specification may be due to the failure of the biweekly formula used by the Board fully to reflect the normal incidence of absences longer than 2 weeks.

While the General Councel in the course of his investigation has endeavored to uncover all periods of unavailability for employment for all of the employees here involved, where the investigation is carried on 5 or 6 years after the event, employees are very likely to be unable to recall all of the periods during which they were unavailable for employment. No excepted periods of employment appear in the Specification for slightly over half of the employees who allegedly have never been offered reinstatement. The further fact that, with a very few exceptions, pregnancies and illness were the only reasons given in the Specification for excepted periods of employment also tends to confirm my conclusion that the General Counsel, despite his best efforts, probably has been unable to uncover

[16] While the Specification also shows that certain employees did not appear on the payroll for periods ranging from 2 weeks to well over a year, on the present record I cannot assume as to employees who did not appear on the payroll for periods longer than 3 months that they were on a leave of absence. It is more likely that the failure of such employees to appear on the payroll was the result of their quitting the Respondent's employ, and that their reappearance on the payroll was due to the Respondent's rehiring of them. The 3 months' dividing line is based upon my conclusion that 3 months is the maximum period that employees of the economic level of the Respondent's operators are likely to take off from work due to pregnancy.

all of the periods of unavailability which should have been excepted.

Another factor which causes me to question whether the Board's biweekly formula fully takes into account absences of more than 2 weeks is the testimony of Compliance Officer Jones concerning the results of a comparison which he made for the last two quarters of 1955 between the average actual quarterly earnings of strikers after they had returned to work and the figure given in the Specification as the measure of backpay for strikers during these periods. The comparison was made for the operators in Group 5 only, and for the purpose of making the comparison the General Counsel included the earnings of the employees who worked throughout the respective quarters. These comparisons showed that for the 3rd quarter of 1955 the average earnings of 48 returned strikers was $375.68. The comparable figure given in the Specification for the gross backpay during that quarter was $410. Thus it appears that the figure for the gross backpay given in the Specification overstates the actual earnings of the 48 returned strikers who worked throughout the quarter by about 9 percent. In the 4th quarter of 1955, 79 returned strikers worked throughout the quarter. Their average earnings during this quarter were $323.71. The gross backpay stated in the Specification for that quarter is $355.05. According to my arithmetic, the gross backpay figure contained in the Specification overstates the actual earnings of these 79 returned strikers by 3.5 percent.

Under all the circumstances I am convinced that some adjustment in the Backpay Specification is necessary to compensate for the fact that the biweekly method of computation used in the Specification, although it takes into consideration some absences, does not fully reflect the extent of absences

longer than 2 weeks. The question remains as to the extent of an adjustment which would be fair to all concerned.

The comparisons made by Compliance Officer Jones indicate that for the last two quarters of 1955 the Board's biweekly method of computation overstates actual earnings of 9 percent and 3.5 percent, respectively. The Repondent's comparisons between the total quarterly earnings of the employees in the control group for the operators (the incumbents and the replacements) computed on the biweekly basis adopted in the Specification and the average quarterly earnings of all the employees who did any work during the quarter show a larger variation.[17] The figures stated on page 9 with respect to the earnings for the 3rd quarters of 1955 and 1957 show, according to my calculations, that the Board's biweekly method results in a figure 20 percent higher for the 3rd quarter of 1955, and about 10 percent higher for the 3rd quarter of 1957, than when the Respondent's quarterly method is used.

However, I have found that the Respondent's quarterly method does not give the fair measure of the backpay to which the employees here involved are entitled to because it understates the earnings of employees who worked with normal regularity during the backpay period. In view of this fact and the further fact that the Specification takes into account longer absences because of pregnancy and illness, etc., I cannot accept the Respondent's suggestion that the Board's biweekly method of computation is high by about 20 percent.

[17] The Respondent in its memorandum offers other comparisons based upon facts not of record in this proceeding. I have limited my consideration to the facts which are in the record in this case.

The comparisons made by Compliance Officer Jones indicate that for the last two quarters of 1955 the Board's biweekly method of computation overstates actual earnings by 9 percent and 3.5 percent, respectively, in these quarters. President Rutter testified that normal absenteeism in the plant averaged approximately 1 day per employee per month. Assuming that there are 22 working days per month, this would suggest that employees were absent 4.5 percent of the time each month on an average.

Upon consideration of all the evidence adduced in this case, I conclude that an adjustment factor of 6 percent fairly reflects the extent to which the Board's method of computation overstates the gross backpay due because it fails fully to reflect the absences which a typical employee has in a normal year. Accordingly, it will be directed that in computing the net backpay of each of the employees in Group 5 (operators), the figures appearing in the total gross column shall each be reduced by 6 percent.[18]

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[18] This determination, in effect, settles the question of the extent to which the employees here involved would have been absent during the backpay period (in addition to the extent taken into consideration in the Specification). Accordingly, it will not be pertinent hereinafter to inquire into actual additional periods of unavailability for employment on the part of the employees here involved. By not objecting to the use of some formula, the Respondent is in effect agreeing that proof of unavailability with respect to specific employees is inadmissible. Such unavailability in individual cases is necessarily subsumed in the use of the formula. The only alternative would be to abandon the formula and put the Respondent to its proof in each case. See *N.L.R.B.* v. *Brown & Root, Inc.*, 52 LRRM 2115, 2120, decided January 4, 1963 (C.A. 8).

2. The employees in Groups 1–4

The Respondent asserts that by including in the control groups for the employees in Groups 1–4 only employees who had worked for the Respondent 6 months or longer the Board computed its average on the basis of the most experienced and capable employees in the four groups, thus raising the average. However, six out of the seven employees in Groups 1–4 had more than 6 months' experience, and, in view of the length of the backpay period, any overstatement of the seventh employee's earnings would be very slight, indeed.

With respect to the four employees in Group 1, the Respondent contends that the Board improperly lumped cutters, clicking machine operators, and spreaders in one group. It appears, however, that this grouping worked to the Respondent's advantage. Three of the four employees in this group, Breaud, Cerf, and Lewis, were in a high pay category, each being paid at the rate of $1.45 per hour the last week before the strike, and the fourth, Lotten, was being paid at the rate of $1.23 per hour. Since more than one-third of the employees in the control group for the cutters and clicking machine operators were lower paid employees, the inclusion of their wages in the average would tend to lower the biweekly average used as the measure of the biweekly earnings of the three high-pay employees.

The Respondent argues with respect to the one employee in Group 4, Freddie Harris, that it is inequitable to take as the measure of his gross backpay the average earnings of those in both the truckdrivers and warehouse utility employees categories for the reason that the pay of the former is considerably higher than that of the latter. Since there does appear

to be more than a 25-percent differential between the rates of the lower paid employees and the two higher paid employees who make up the control group for Freddies Harris, the Respondent's point is well taken, assuming, of course, that the Respondent establishes at the forthcoming hearing that Freddie Harris at the time of the strike was in the warehouse utility employee category rather than that of truckdriver. If this is properly established, the earnings of Ernest Cooley appearing on Appendix D–1 of the Specification will be taken as the measure of Harris' gross backpay, rather than the combined earnings of Cooley, Bayard and Woodard (see p. 58 of the Specification).

3. Conclusions

For the reasons stated above, I conclude that the method of computation used in the Board's Backpay Specification herein is a reasonable one under all the circumstances of the case, subject to the modification stated in the Order below.

ORDER

1. The method of computation adopted in the Backpay Specification heretofore issued herein is hereby approved subject to the modification that as to each of employees in Group 5, the figures in the total gross column shall each be reduced by 6 percent.

2. As previously notified, the Respondent, within 5 days from the receipt of this Preliminary Intermediate Report and Order, shall file an answer to the Backpay Specification, as provided in Sec. 102.54 of the Board's Rules and Regulations, Series 8 as amended.

Dated at Washington, D.C.

OWSLEY VOSE,
Trial Examiner.

United States of America
Before The National Labor Relations Board
Division of Trial Examiners
Washington, D.C.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
and
AMALGAMATED CLOTHING WORKERS OF AMERICA,
AFL-CIO

Cases Nos. 15-CA-721, 15-CA-723

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TXD–212–64
New Orleans, La.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D.C.

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.
and
AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO

Cases Nos. 15–CA–721, 15–CA–723

John Hobart Hector and *Edward A. Champagne,* of New Orleans, La., for the General Counsel.

Henry J. Read and *Peter H. Beer* of *Montgomery, Barnett, Brown & Read,* of New Orleans, La., and *Brown, Herman, Scott & Young* of Ft. Worth, Tex., for the Respondent.

Ralph N. Jackson, M. G. Rossi and John Ormond, of New Orleans, La., and *James J. Grahm and Jacob Sheinkman,* of New York, N.Y., for the Amalgamated.

Before: *Owsley Vose,* Trial Examiner.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION IN BACKPAY PROCEEDING [19]

STATEMENT OF THE PROCEEDINGS

This Decision supplements and is to be considered together with the Preliminary Intermediate Report and Order in Backpay Proceeding issued herein by the Trial Examiner on January 23, 1963, after a hearing in November 1962. In his Preliminary Intermediate Report the Examiner considered the method of computation of backpay adopted by the General Counsel in the Specification and concluded that it was an appropriate method of computation, subject to certain minor modifications. [20] The Backpay Specification, it will be recalled, raised issues growing out of the Company's alleged delay in reinstating 137 employees and its failure, in the period covered by the Specification, to reinstate 70 additional strikers. It covers the backpay accruing up to the end of the second quarter of 1961 and the evidence received in this proceeding in 1963 covers only the backpay accrued up to this date. Any backpay accruing after June 30, 1961, is subject to a later determination.

In the course of the proceedings in November 1962, the Examiner granted in part and denied in part the General Counsel's motion to strike the Company's answer in its entirety because of its alleged lack of specificity and noncompliance with Section 102.54(b) of the Board's Rules and Regulations, and granted the Company leave to file an amended answer. In his opinion issued at that time, the Examiner stated that the Company's amended answer, should conform to

[19] The Board's original decision herein is reported at 115 NLRB 388.

[20] On line 36 of page 11 of this Report the figure should be $335.05 instead of $355.05.

the Board's Rules and Regulations. At the hearing in November 1962, the Examiner emphasized his view that Section 102.54(b) of the Board's Rules and Regulations requires the filing of a meaningful answer, apprising the Examiner and the Board of the Company's position with respect to each of the employees named in the Specification. On January 29, 1963, the Company filed an amended answer to the Backpay Specification. Thereafter on various dates between February 12, 1963, and September 30, 1963, a hearing was held on the issues raised by the Backpay Specification and the Company's amended answer thereto. [21]

During the hearing motions were made by the General Counsel and the Amalgamated (hereinafter referred to as the Union) to amend the Specification, and by the Company to amend its amended answer. Where the effect of granting such motions when made by the General Counsel was to increase the liability of the Company, such motions, were denied, absent excusable error, newly available evidence, and like considerations. When motions to amend the Company's amended answer were made, and the effect of granting such motion was to open up new defenses to litigation, defenses of which the Company had knowledge or reasonably should have had knowledge at the time its amended answer was prepared, these motions were de-

[21] The following corrections are hereby made in the typewritten transcript of testimony given in this case at the hearing:

Page	*Line*	*Correction*
1411	17	Insert "except" between "answer" and "with"
1913	19	Add "Marie G. Lockett, recalled"
1990	6	Insert "Doris Earline Bowles, recalled"
2121	1	Change "awards" to "warning"
2121	2	Change first "it" to "I"
2254	10	Change "litigate" to "mitigate"
2213	1	Change "injuries" to "increases"
6376	21 et seq.	Change "Desederia" to "Daisy Ray"

The foregoing is not intended to be a comprehensive list of corrections.

nied, absent special considerations. Other motions to amend the Specification and the amended answer were granted."

Repeatedly during the hearing the Company sought to cross-examine witnesses concerning the nature of the investigation conducted by the General Counsel in preparing the Specification, to adduce evidence concerning the General Counsel's alleged failure to cooperate with the Company in resolving its reinstatement and backpay problems, and the reasons for the delay in issuing the Specification. Evidence was received at

[**] In the opinion of the Examiner, he was obliged to require strict observance of Section 102.54(b) of the Board's Rules and Regulations which deals with the contents of answers to Backpay Specifications. This Section requires specific and detailed answers to all allegations of the Specification and specifically states, as to matters within the knowledge of the Respondent, that "a general denial shall not suffice." In the Examiner's view, one of the primary purposes of the Board in adopting the specialized procedure for handling backpay cases was to narrow the issues to be litigated and to simplify the decisional process. This objective would be largely frustrated if the Company were to be permitted to adduce evidence concerning every possible defense which occurred to it in the course of a long trial. See *W. C. Nabors Co.*, 134 NLRB 1078, 182 and n. 6, enforced, 323 F. 2d 686 (C.A. 5), cert. denied, February 17, 1964. Cf. *United States Air Conditioning Corp.*, 141 NLRB 1278, 1281-1282; *Liquid Carbonic Co.*, 116 NLRB 795.

The same considerations which render it essential that the Company file specific and meaningful answers require that the General Counsel also be bounded by his Specification. Particularly in the circumstances of this case, with the General Counsel having had access to the Company's records for years, the Examiner can see no reason to permit the General Counsel to enlarge the issues to be litigated in this proceeding, while at the same time holding the Company to be bound by its amended answer. Accordingly, the Examiner has attempted throughout this proceeding to hold the parties to their pleadings, except in the case of excusable error, newly available evidence, and the like.

the hearing concerning the fact of the delay in issuing the Specification, but evidence as to the reasons for the delay was for the most part excluded. The Examiner did offer to receive evidence of any wrongdoing or unlawful conduct upon the part of representatives of the General Counsel which may have contributed to the delay, but no such evidence was proffered. Evidence as to the General Counsel's alleged lack of objectiveness in investigating the matter and his alleged failure to cooperate with the Company in resolving the differences between them was also excluded in the absence of any offer to prove that wrongdoing or unlawful conduct on the part of representatives of the General Counsel was involved.

On December 9, 1963, the General Counsel and the Amalgamated filed briefs dealing with both the broad issues here involved and the specific cases of the 207 employees named in the Specification. The Company on the same day filed a memorandum covering its general contentions regarding its backpay obligation and not treating any of the individual cases. These documents have been carefully considered.

Upon consideration of the Specification, the pleadings as amended, the Examiner's observation of the witnesses, his review of the testimony and the exhibits,, and the entire record in the case, the Examiner makes the following.

FINDINGS AND CONCLUSIONS

1. Preliminary statement; conclusions concerning the Company's reinstatement and backpay obligations flowing from its unfair labor practices during the strike

As found in the Board's original decision in this case (115 NLRB 388), on April 21, 1954, the Company's employees went out on a strike called by the

Union, their duly certified bargaining representative. As the Examiner construes the Board's original decision, the Board determined that although the differences between the parties during the negotiations preceding the strike which caused the Union to decide on strike action may have been economic in nature, because of the Company's conduct "[f]rom the moment of the strike," which evidenced a "rejection of the very principle of collective bargaining," the strike was to be deemed an unfair labor practice strike from its inception.

Accordingly, the Board in its original decision provided for the conventional remedy usually entered in unfair labor practice strike situations, as follows:

> (b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went on strike on April 21, 1954, or thereafter, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired on or after that date, and make such applicants whole for any loss of pay suffered by reason of the Respondent's refusal, if any, to reinstate them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

The "Remedy" section of the Intermediate Report, insofar as it is pertinent here, omitting footnotes, is as follows:

> . . . The Company shall also make whole such strikers for any loss of pay they may have suffered by reason of the Company's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned, less his net earnings, during the period from 5 days after the date on which he applies for reinstatement to the date of the Company's offer of reinstate-

ment of pay shall be computed on a quarterly[23]

II. The ap ons of the strikers for reinstatement

On Apri 5, the Union mailed a registered letter to the y which was admittedly received by it on April . The letter stated that the employees had voted minate the strike and continued as follows:

> P
> whe e advised that each of the employees
> her es are listed on the attached sheets
> par rs to return to work for your com-
> inf nditionally and immediately. Kindly
> sho when and where these employees
> rn to work.

Attached etter was a list containing the names of 113 str ployees. The Union supplemented its April 5 l th another letter, mailed on April 8, 1955, on letter staf 25 additional employees who, as the your com re offering "to return to work for letter wa conditionally and immediately." This 1955. ved by the Company on April 11,

Follow

the Com receipt of the Union's April 5 letter telephoned Phillip Lampert, regional

[23] In the tion gross backpay is computed, not on a strict cale erly basis, but on the basis used by the Company in it Under the Company's biweekly payroll system, the from 10 nsist of an even number of weeks, ranging In view o me quarters to 16 weeks in other quarters. pay shall that the Board's Order requires that backendar qu ed on a quarterly basis and the further fact backpay urity records give interim earnings by calthe differ as been found necessary to recompute gross Specifica calendar quarterly basis. This accounts for he amounts of gross backpay given in the se appearing in the Appendix below.

counsel for the Union, and told him to send the employees to the plant. Employees started coming in to the plant "in droves" at this time, as Eugene Rutter, the Company's president, testified, and consequently the Company called Lampert back and requested him to send the employees in at the rate of 20 a day. Lampert agreed to do so.

On April 11 the Company replied to the Union's letter of April 5 and April 8, as follows:

> We acknowledge receipt of your recent letters of April 4th and 8th, advising us that the strike has been officially terminated and that certain persons who participated in the strike are desirous of returning to their former employment with this company.
>
> We suggest that such persons as desire to return to work with us file application with our Personnel Office as soon as possible.
>
> Since we cannot process all applications at one time, we would suggest that you have the applicants come in at the rate of no more than 20 per day.

Commencing on April 14, 1955, the Union started notifying employees named in its April 5 and 8 letters to make personal applications for reinstatement. The Union gave these employees a form letter to give to the Company, the text of which is as follows:

> In reference to our correspondence of recent date, M ——— ——— is applying for employment. She would prefer the job she had prior to the strike.
>
> However, she is willing to accept any available employment if her former position is unavailable.

The Union, in compliance with the Company's request to send the employes in the rate of 20 a day, notified the employees to go to the plant at intervals. A num-

ber of employes testified that they did not attempt to make a personal application for reinstatement until they were notified by the Union to do so. The Examiner finds that the experience of these employees is typical of that of the strikers as a whole who made personal applications for reinstatement shortly after the strike ended.[24]

Thereafter, on April 22 and May 13, 1955, the Union sent the Company the names and addresses of certain additional employees who were offering to return to work for the Company "unconditionally and immediately." These letters were received by the Company on April 25 and May 14, respectively. In the Union's three letters, it requested immediate reinstatement on behalf of a total of 153 employees. Of these 147 are named in the Specification, the General Counsel having satisfied himself after his investigation that the Company had either reinstated the others or that they were not entitled to any relief herein. In its April 22 letter, the Union stated as follows:

> In response to your letter of April 11, 1955, we wish to point out that although we have sent your employees, who participated in the strike, to your Personnel Office in groups of 20 per day, as you requested, we consider those em-

[24] In making this finding, the Examiner is relying not only upon the testimony of the above-mentioned employees to this effect, but also has considered offers of proof, made in question and answer form through various witnesses, such as Veoila Gibson Hamilton and Zearlee Franklin. The Examiner has reconsidered his rulings excluding testimony on this point, and hereby reverses it, concluding that the testimony of these witnesses that the Union had told them to go to the plant and file a personal application for reinstatement was relevant and material to the question whether the Union had acquiesced in the abandonment of its original requests for reinstatement on behalf of the employees named in its April 5 and April 8 letters.

ployees as having unconditionally applied for employment on the date you received our registered letters along with lists of names attached thereto.

In addition to the striking employees in whose behalf the Union submitted applications for reinstatement in one or more of the Union's letters of application, a total of 11 more striking employees made personal applications for reinstatement during the strike. In the period between the end of the strike on April 5, 1955 and March 9, 1956, an additional 52 strikers not named in any of the Union's letters of applications also personally applied for reinstatement at the plant. As appears more fully below, of the total of 207 strikers named in the Specification, the Examiner has found that 199 made valid timely applications for reinstatement, either personally or through the Union. The specific dates on which the various strikers applied for reinstatement and whether the General Counsel is relying on a Union letter or a personal application at the plant are set forth below in the discussion of the individual cases.

The Company contends that the Union agreed, in effect, not to rely on its original applications upon behalf of the 153 strikers named in its letters, but rather to rely solely upon the personal applications thereafter made.[25] In support of this contention the

[25] The Company apparently no longer contends that the Union, unless it had been individually authorized to do so by each of the individual strikers named in its letters of application, lacked the authority to make applications for reinstatement on behalf of these strikers. It has long been settled that the statutory bargaining representative has the authority to apply for reinstatement on behalf of employees whom it represents regardless of whether individually authorized to do so or not. *Brown & Root, Inc.*, 99 NLRB 1031, 1041–1043, enforced, 203 F. 2d 139, 147 (C.A. 8); *Efco Mfg. Co.*, 108 NLRB 245, 256, enforced without contest by Efco on this point, 227 F. 2d 675 (C.A. 1).

Company relies on various facts, including the exchange of letters between the Company and the Union, the Union's compliance with the Company's request that it send the strikers to the plant at the rate of 20 a day, and the testimony of some of the employees that they did not personally apply at the plant until the Union told them to. In the opinion of the Examiner, this contention is not meritorious.

The Company's letter of April 11, 1955, as stated above, contained the following paragraph.

> We suggest that *such persons as desire to return to work* with us file applications with our Personnel Office as soon as possible. [Underlining added.]

The underlined portion of the above quotation, by indicating that only those employees who personally applied at the plant would be given consideration, treats the Union's blanket applications for reinstatement on behalf of the employees named in its two letters in being ineffectual insofar as creating any reinstatement obligation is concerned. As Eugene Rutter, the president of the Company, admitted, it was in fact the Company's position after the strike, that it would consider only the employees filing personal applications. Indeed, this is still the Company's position, as its amended answer is premised upon the assumption that the Union letters of application were not valid applications for reinstatement on behalf of the employees named therein.

By insisting in its April 11 letter upon a personal application by the striking employees named in the Union's first two letters of application, the Company was exceeding its rights in the situation in which its unfair labor practices had placed it. In effect the Company was rejecting the Union's applications for reinstatement for the employees named in the letters. In

such circumstances it appears unlikely that the Union would voluntarily waive the rights created by its letters of application, and clear proof of such a waiver would be required before the Examiner could sustain the Company's contention in this regard. The record in this case is lacking in such proof. Indeed, the Union's letter of April 22, 1955, makes it explicit that the Union was *not* abandoning its earlier blanket applications for reinstatement made on behalf of the employees.

The facts upon which the Company relies in support of its contention in this regard—the fact that the Union complied with the Company's request that it send strikers into the plant at the rate of 20 a day, that it notified the employees to go to the plant and make personal applications, and that it gave the employees the mimeographed letters of application to give to the Company when they personally applied—are not inconsistent with reliance on the Union's original blanket letters of application. These facts are just as consistent with the inference that the Union desired to be helpful in assisting the Company in handling the problem of restoring a large number of strikers to work in a short period of time. Particularly since the Union was under no legal obligation to facilitate the Company's reinstatement task, its efforts to cooperate should not be construed as indicating an abandonment of its earlier blanket applications, absent clear proof of a meeting of the minds in this regard. Such proof, the Examiner concludes, is lacking in this case.

Under all the circumstances the Examiner rejects the Company's contention that the Union in effect withdrew its original applications for reinstatement set forth in its April letters to the Company. Compare *N.L.R.B.* v. *Brown & Root,* 203 F. 2d 139, 147 (C.A. 8), enforcing 99 NLRB 1031, 1087, which involved a

similar response from an employer to a union's blanket letter of application.[26] The Examiner concludes that the employees named in the three Union letters of application made valid applications for reinstatement on the day that these letters were received by the Company. In view of this conclusion, in the cases of the employees named in any of the Union's letters of application, the Examiner has not included any discussion of the application other than to indicate in the heading of the individual case discussions that the employee is covered by a Union letter of application. This is done by the insertion of a "U" in parenthesis following the date of application relied upon by the General Counsel.

III. The Company's Reinstatement of Strikers and Its Retention of Replacement Employees in the Months After the Strike was Called Off.

During the strike the Company hired back a number of strikers who filed written applications for reinstatement with it. It also hired a number of additional employees who were not working for it at the time the strike was called. As a result of its hiring and rehiring during the strike, the Company had on its payrolls at the time the strike ended 241 reinstated strikers and about 145 replacements, including 135 female replacements.[27] As used in this Decision, the

[26] The Examiner concedes, as the Company points out, that a union may "agree to modify an unconditional group request so as to require individual applications" (*Efco Mfg. Co.*, 108 NLRB 245, cited in the Company's memorandum). However, as indicated above, the record fails to establish that such a modification was agreed upon by the Union in this case.

[27] This figure and the subsequent figures given concerning the number of female replacements are not represented to be exact. The information concerning the number of replacements on the Company's payroll at various times has been obtained from the

term replacement is used to refer to an employee hired during the strike and who was not on the Company's payroll when the strike began. These replacements were vulnerable to discharge to make room for returning strikers under the remedial provisions customarily entered by the Board in unfair labor practice strike situations.[28] As shown in the table below, after the

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Specification and from GC–47. (This is a reference to General Counsel's Exhibit No. 47). The Specification states the earnings of a control group of replacements for female operators for each 2 weeks in the backpay period. There has been no challenge in this proceeding of the accuracy of these figures, which were obtained from the Company's records. GC–47 is an exhibit compiled by the General Counsel from the Company's records, consisting of lists of all employees hired by the Company from the beginning of the strike to the end of the period covered by the Specification, giving the periods of their employment. These lists exclude all those used as replacements in the Specification and all employees appearing on the Company's prestrike payroll. As the General Counsel concedes, there are certain deficiencies in this exhibit. It includes *all* employees, i.e., supervisors, office clericals, and others who may not be in the appropriate unit. It excludes others who do not appear on the Company's April 17, 1954 payroll, the last payroll before the beginning of the strike on April 21, 1954), who conceivably may nevertheless be entitled to employee status, for example, because of being on a leave of absence due to pregnancy. In view of the fact that nonunit employees constitute a very small percentage of the Respondent's employees as a whole and that a relatively small percentage of the Respondent's employees were likely to have been on a formal leave of absence at the time the strike was called, the overstatement of the number of female replacements at any time necessarily is relatively small. Such overstatement, in the opinion of the Examiner, does not destroy the usefulness of the exhibit. The Company did not challenge the reliability of the information contained upon the exhibit, but objected on the grounds that the admitted deficiencies in the exhibit impaired its usefulness.

[28] At the time the strike terminated, the hearing had already been held before a Trial Examiner of the Board on charges that the Company had by its unfair labor practices caused or pro-

strike was called off, the Company gradually reinstated additional strikers who had personally applied for reinstatement.[29] During the months following the strike, replacements became separated from the payroll at a much slower rate. With few exceptions, the reason for the separation of a replacement from the payroll does not appear on the record. Consequently, in most cases it cannot be assumed that the replacements separated represented dismissals to make room for returning strikers. Such separations may have resulted from voluntary quits, discharges for cause, or for other reasons.

The figures given in the tables below show the cumulative total numbers of strikers reinstated in each of the first, second and third months after the strike was called off, and at the end of 1955. The table also shows the cumulative total number of separations of replacements occurring during the same periods.[30]

---

longed the strike, and the Company was therefore apprised that its treatment of the returning strikers would be closely scrutinized by the Board.

[29] In general, the Company did not reinstate any striker solely on the basis of a union letter of application. As Rutter testified unless a striker personally applied at the plant the Company had no knowledge of her availability.

[30] The figures given are for female replacements only. It is only as to the female operators that the Company pleads a lack of a vacancy in their classification as a defense. Other defenses are pleaded as a defense in the case of the seven male strikers here involved.

By	*Total number strikers having applied for reinstatement* [1]	*Total number strikers reinstated* [1]	*Total number replacements separated*	*Total number replacements retained*
May 5	180(13)	30(5)	11	128
June 5	189(17)	57(10)	25	113
July 5	193(18)	62(11)	32	104
Dec. 24	222(28)	132(12)	59	86

[1] This figure includes both strikers named in the Specification and those not named. The number of the latter are given in parentheses.

During the first 3 months after the end of the strike the Company hired nine female employees who were not on the payroll when the strike began. Between April 6, 1955, and December 24, 1955, the Company hired a total of 27 new female employees.[31]

IV. The Company's General Contentions Regarding Its Fulfillment of Its Reinstatement and Backpay Obligations

A. *The Company's Burden of Proof Contentions*

First, the Company objects to the Examiner's holding, in cases where the General Counsel has established a *prima facie* case of an application for reinstatement and a refusal of the application by the Company, that the Company has the burden of showing the nonavailability of a comparable job at the time of the application or other similar matters of defense. The cases, however, support the Examiner's ruling in this regard. *Mastro Plastics Corp.*, 136 NLRB 1342, 1357–1358. *N.L.R.B.* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 56 (C.A. 6); *Snow* v. *N.L.R.B.*, 308 F. 2d 687, 695 (C.A. 9).

Secondly, the Company strenuously challenges the Examiner's ruling that it has the burden of establishing matters in diminution of damages, such as proving the amounts of interim earnings of employees and developing the facts regarding the efforts of the employees to mitigate damages. As to the broad principle that the burden in this regard is the employer's, the authorities sustain the Examiner. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 199–200; *Nabors* v. *N.L.R.B.*, 323 F. 2d 686, 692 (C.A. 5); *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F. 2d 447, 454 (C.A. 8);

[31] These figures are ascertained from the Specification and from GC–47.

Fisher Construction Co. v. *Lerche,* 232 F. 2d 508, 509 (C.A. 9); *Mastro Plastics Corp.,* 136 NLRB 1342, 1346; *Williston on Contracts,* Sec. 1360.

The Examiner recognizes that the law's imposing the burden of proof regarding such matters upon the employer places him in a very difficult position. In the nature of things, evidence concerning an employee's search for work is something peculiarly within the knowledge of the employee. It would be a rare case indeed, where an employer would have an independent means of ascertaining the facts concerning an employee's search for work years before.[32] And to develop the facts the employer has to rely on the employee whose interests are wholly adverse to those of the employer. Even if the employee exhibits the utmost good faith, memories dim with the passage of time, and if the employee is simply unable to recall the facts as to his search for work during his periods of unemployment, as some of the employees whose cases discussed below were unable to do, the employer has no real opportunity to develop an offset against the backpay claimed in the Specification.

On the other hand, however, it should be borne in mind that the law obliges employers to reinstate unfair labor practice strikers, upon application, dismissing replacements, if necessary. In over half of the cases here involved the Company defended its delay or its refusal to reinstate upon the grounds that it had no vacancy for the particular striker in her former operation. As found hereinafter, excepting in a very few cases, the Company did not even attempt to offer proof supporting this defense. In many of these cases,

[32] Even in the cases which are handled most expeditiously (assuming that the case is litigated in the courts), several years elapse between the events in controversy and the holding of a backpay hearing.

such proof as was adduced refuted the very contention being made. In other words, it established that a replacement was still working on the operation which the striker had done before the strike at the time of the striker's application for reinstatement. Thus the problems of proof concerning which the Company complains in this case were largely of its own making. As found above, the Company simply refused to dismiss replacements to make a place for the returning strikers.

To illustrate how the Company's failure to comply with its obligations under the Act compounded its problems, it may be helpful to consider the case of one of the employees, Dorothy B. Rubit, a trim-and-turn collar operator. The Company's records indicate that she applied for reinstatement during the strike, on February 2, 1955, but was not hired. Rubit was also named in the Union's letter of application dated April 5, 1955. Rubit was not reinstated to her old job until August 1956. However, Rubit was discharged 1 week later under circumstances indicating that her production was low. A replacement in Rubit's operation—trim-and-turn collar—worked almost continously throughout the backpay period. Had the Company fulfilled its statutory duty in February or April 1955, which it readily could have done, not only would it not have been confronted with the problem of Rubit's loss of memory concerning her search for work, but also it probably would not have been faced with such a serious problem of Rubit's loss of skill during her long period away from the plant.

Thus, while the law works a hardship on the Company in imposing upon its the burden of proof with respect to matters in diminution of damages, also to be considered is the hardship upon an employee such as

Rubit, who as a result of the Company's unlawful conduct in refusing her application for reinstatement, has lost not only her steady job, but also her skill in the operation which she had performed for many years before the strike. As between the Company, whose unlawful conduct gave rise to the problem in the first instance, and the employee victim of this wrongdoing, it seems to the Examiner not unreasonable that the Company rather than the innocent employee should bear the consequences of its own unlawful conduct.

B. *The Company's contentions based upon the General Counsel's delay in issuing the Specification, the nature of the General Counsel's investigation, and the General Counsel's alleged failure to cooperate with the Company in the course of the investigation*

The Company contends that the General Counsel unduly delayed in completing his investigation of the matters here involved, that he failed to be objective in his investigation of the facts concerning the Company's obligations flowing from its unfair labor practices during the strike, and that he failed to fulfill his obligation to cooperate with the Company in an effort informally to dispose of the differences between the parties. The General Counsel's alleged derelictions in this regard, the Company contends, all contributed to a denial of a fair hearing in this case.

These contentions must be rejected because the record is without the factual basis upon which such contentions of necessity must be predicated, the Examiner having ultimately ruled (albeit not without first receiving some evidence bearing upon these issues) that none of these issues were properly before him for disposition and, in accordance with this ruling having refused, absent the proffer of evidence of

wrongful or unlawful conduct on the part of the General Counsel which was not forthcoming, to permit the parties fully to develop the facts concerning these issues. The propriety of the Examiner's ruling in this regard is indicated by the decision of the Fifth Circuit in *Nabors* v. *N.L.R.B.*, 323 F. 2d 686, 688-689 (C.A. 5) certiorari denied, February 17, 1964, discussed more fully below.

It cannot be denied that there was a considerable lapse of time between the decision of the Court of Appeals for the Fifth Circuit enforcing the Board's Order herein involved and the issuance of the Specification herein. The opinion of the Court was handed down on June 10, 1957. The Court's decree, which, like the Board's Order, directed the reinstatement upon application of the striking employees, was entered on August 19, 1957. The Specification was issued on November 16, 1961. The Examiner, for convenience, refers to this lapse of time as a delay, without intending to suggest one way or another that the General Counsel is subject to criticism for the lapse of time involved.

To complete the factual picture on this point it should be stated that on November 7, 1957, the Mr. Henry J. Read, Company's attorney, mailed a letter to the Board stating in part, as follows:

> As you know, we are handling the matter of complying with the decree of the United States Court of Appeals for the Fifth Circuit enforcing the order of the National Labor Relations Board in the subject cases. Our client has already complied with some of the provisions of the decree, and its presently engaged in bargaining with the representatives of the Amalgamated Clothing Workers of America. If any instance of a failure to fully comply with the order is brought to your attention, we would

four contacting us promptly so that
Betwee ive measures as may be necessary
the Ge ediately taken in order to assure
the Co nce with the decree.

analysi 7, 1957, and March 22, 1960, when
tion insel's representative requested that
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Exami ting. The General Counsel never
pany's pany's letter of November 7, 1957,

The tter of March 22, 1960, which the
delay t regard as responsive to the Com-
Court vember 7, 1957.[33]

forth e clearly holds that the mere fact of
limita not defeat backpay claims. As the
by th 3 F. 2d, at 689), "the claims set
by th pay specifications are not barred by
invest hes, and . . . the evidence offered
was to show irreparable injury caused
where irrelevant." The General Counsel's
prese he *Nabors* case, in which the delay

[33] F ars, involved only 21 employees,
assum eral Counsel's investigation in the
in th ved well over 400 employees.
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attorn set out in the text above it may not be
Comp t the General Counsel had not investigated
had e Company's reinstatement and backpay
divid neral Counsel's letter to the Company's
questi which is attached as Exhibit F to the
answer, indicates the General Counsel
this time that there were some 470 in-
m there were reinstatement and backpay

The Company's assertions that the General Counsel failed to be objective in his investigation of the case and sought to build up a case of liability on the part of the Company is not documented in the Company's memorandum and is wholly without foundation in the record, since, as stated above, this issue also was not litigated at the hearing. The contention is apparently based upon the Company's suspicions growing out of the General Counsel's refusal in advance to turn over to the Company its complete investigative files on the case. The Examiner, while declining to require any such sweeping disclosures, did require the General Counsel to produce, with respect to all employees named in the Specification regardless of whether they were called as witnesses by the General Counsel or the Company, all statements and other material falling within the scope of the *Jencks* rule, as applied to Labor Board cases.[34] As a result of the Examiner's refusal to permit an inquiry into the nature of the General Counsel's investigation, the record does not afford a factual basis for the critical comments about the General Counsel's investigation which are contained in the Company's memorandum.

As to the General Counsel's alleged failure to cooperate with the Company in resolving the reinstatement and backpay problems with which it was faced, this contention is based almost entirely upon the absence of communications between the Company and the General Counsel between November 1957 and March 1961. As indicated above, the Examiner cannot rule on this contention because it was not fully litigated at the hearing. It may be noted in passing that, contrary to the assertion in the Company's memorandum

[34] *Jencks* v. *United States*, 353 U.S. 657; *Ra-Rich Mfg. Corp.*, 121 NLRB 700.

(p. 22), that Compliance Officer Loren Jones did not admit the General Counsel's lack of cooperation at all times prior to the filing of the Specification. Jones testified that after sending a letter about October 1961 requesting a statement of the Company's position with respect to the employees as to whom there remained reinstatement or backpay problems and receiving a reply from the Company, he did not attempt to discuss these problems with the Company or its representatives before the Specification was issued. In this same portion of his testimony Compliance Officer Jones testified that normally an employer gives some indication that he desires assistance about such problems and that no such indication was forthcoming from the Company.[35]

Furthermore it may be observed that the great bulk of the Company's asserted reinstatement problems arose in the period after the strike was called off in 1955, long before the Company was in contact with the Regional Office, and most of the questions which the Company stresses in its memorandum came up, as found herein, because the Company failed to recognize the Union's letters of application as constituting valid applications on behalf of the strikers named therein, and because the Company for the most part refused promptly to dismiss replacements to make room for strikers. As found below, there were only a relative handful of operators who presented reinstatement problems. Out of the 129 strikers as to whom the Company raised the "no vacancy" defense the Company could have reinstated 113 of them at least by the time they personally applied at the plant by

[35] Jones testified that in 1961 he no longer regarded the Company's November 1957 letter as presenting a current request for assistance.

simply putting them back on their old operations, dismissing the replacements who were performing their former operations at that time. But the Company failed to do so, and much of the hearing was devoted to taking up the cases of such strikers. In view of the Company's widespread failure to fulfill its statutory obligation to the returning strikers it comes with ill grace from the Company to charge the General Counsel with a failure to cooperate in the investigation phase of the case.

In sum, the Examiner rejects the procedural bars which the Company seeks to raise as a barrier to consideration of the merits of the General Counsel's claim for backpay. He concludes that it is inconsistent with the effectuation of the broad public policies of the Act to permit a hearing for the purpose of determining the extent of the Company's fulfillment of its reinstatement and backpay obligations to be converted into a trial of the General Counsel's conduct of the investigation leading up to the issuance of the Specification.

C. *The Company's contention that it attempted in good faith to reinstate the strikers*

The Company contends that it attempted in good faith to fulfill its reinstatement and backpay obligations in the period after the strike was called off. The Company points out that it reinstated a substantial number of strikers during the strike and urges that its progress in putting the strikers back to work after the strike was called off demonstrates that it made a good-faith effort to fulfill its reinstatement and backpay obligations. For this reason, the Company argues, it should be relieved of all further reinstatement and backpay liability.

In considering this contention it should be borne in mind the Company was in need of experienced workers after the strike was called off. The fact that well over 100 replacements were retained in the first few months after the strike was called off attests to the Company's need for workers. And, as Rutter testified concerning the Company's recurring need for workers, "* * * whether there has been a strike or not. * * * You can never get enough experienced operators to maintain the normal turnover that you experience in running a plant the size of the Company's." The Company had over 600 employees when the strike began. Trained operators, according to Rutter, were one of the Company's valuable assets, the Company having an investment of between $500 and $600 in each operator by the time she attains the desired speed of operation. For this reason, Rutter testified, the Company was eager to have its experienced operators return to work after the strike.[26]

During the strike, with the exception of the period from May 11, 1954, to July 14, 1954, the Company was operating under a learner's certificate issued by the Wage and Hour and Public Contracts Division of the U.S. Department of Labor. To obtain a learner's certificate, which entitles an employer facing a shortage of experienced help to hire learners for a 480-hour training period of subminimum wage rates, the employer must certify that experienced workers are not available for employment. The learner's certificate became ineffective on April 7, 1955, a few days after the

[26] Other circumstances evidence the Company's need for workers in this period after the strike. Commencing in July 1955, the Company placed advertisements for workers in the New Orleans papers. In October 1955, the Company ran an ad seven times in the *Times-Picayune* for "Experienced Power Sewing Machine Operators on Shirts and Pants."

strike was called off. On November 7, 1955, the Company filed an application for a learner's certificate with the Department of Labor in which it stated in answer to a question concerning its efforts to obtain experienced workers, as follows: "We have standing requests with all our employees to bring in experienced acquaintances. We now have difficulty finding experienced persons who are now ready to work again." On the basis of this application a learner's certificate was issued to the Company on December 6, 1955, which was to remain effective until December 7, 1956.[37]

Despite the Company's need for workers after the strike was called off, the Company made relatively slow progress in reinstating strikers. It made even less progress in getting rid of replacements who were filling the strikers' jobs. As the figures in the table in part III above show, although there were about 135 female replacements on the payroll when the strike ended, and the Company thus had numerous positions which could be vacated to make room for returning strikers, in the first 3 months after the strike was over, the Company reinstated but 62 strikers.[38] There were 65 workdays in this period. Notwithstanding all the available vacancies, the Company restored strikers to

[37] Rutter's testimony when originally examined about this subject matter was that the Company definitely had no learner's certificate between May 1954, and December 1957. However, when confronted with records obtained from the U.S. Department of Labor, Rutter admitted that he had been in error in his original testimony. Rutter explained his error by saying that he had been basing his testimony upon information in a certain file, and that through a filing error pertinent material had been placed in another file which he had not seen.

[38] This figure includes not only the strikers here involved, but also others as to whom no claim is made in this case.

their jobs at the rate of less than one a workday. Only 32 replacements left the payroll during this 3-month period.

By the end of 1955, 132 strikers had been reinstated, including 12 for whom no claim is made in this case. By this time 64 female strikers still had not been reinstated. Approximately 86 female replacements still remained on the payroll. Only 59 female replacements had left the payroll since the end of the strike. Thus more than half of the replacements who were on the payroll when the strike ended were still on the payroll at the end of 1955. As of June 24, 1961, the end of the period covered by the Specification, 53 replacements were still on the payroll.

The Company's slowness in reinstating strikers and its failure promptly to dismiss the numerous replacements in order to make room for the returning strikers, in the Examiner's view, evidences that the Company was not seeking in good faith to restore the strikers to their jobs."[39]

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[39] The Examiner has considered the testimony of Karl Striegle, a management engineer specializing in the needle trades industry, who was called by the Company to give his opinion of the Company's efforts to solve the reinstatement problem after the strike was called off. After studying the Company's records giving the time lag between applications and reinstatement for the employees who were put back to work, Striegle concluded, in view of the problems connected with maintaining a balanced flow of work through the plant, that the Company had done an "above average" job of coping with the reinstatement problem with which it was faced at the end of the strike. Striegle's opinion, however, did not take into consideration the Company's failure to displace replacements to make room for returning strikers. Nor did Striegle's conclusion consider the cases of the approximately 70 employees here involved who were never reinstated. In the opinion of the Examiner, both of these are factors which go to the heart of the matter about which

Another circumstance indicating a lack of good faith in the Company's treatment of returning strikers is its failure to substantiate its principal defense. With respect to the 129 employees listed on Schedules 6(d), (e), and (h) of the Company's amended answer, the Company defended its delay in reinstating or its failure to reinstate these employees on the grounds that it had no vacancies in their classifications when they applied for their jobs. Rutter was called to the stand to give testimony in support of this defense. Rutter was questioned about these cases in alphabetical order and, after covering the first seven in the alphabet, this line of examination was discontinued. In each of the seven cases, it was brought out either on direct or cross-examination that at least one replacement was working at the particular operation of the particular striker involved up until the date the striker was reinstated, if not longer. As to the 20 employees in all, concerning whom the Company pleaded no vacancy as a full or partial defense, Rutter's own testimony establishes the availability of a vacancy at the time of the employees' application for reinstatement. Evidence tending to support the allegations of the amended answer was adduced as to only 16 of the 129 employees named in Schedules 6(d)(e), and (h). No evidence whatever was offered in support of this defense in the case of the 93 other employees as to whom this defense was pleaded. Since it was the Company's burden to establish the lack of vacancies it must be assumed that vacancies were available in

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Striegle was asked to give his judgment. For these reasons the Examiner does not regard Striegle's opinion about the Company's reinstatement efforts after the strike as being too persuasive.

the case of these 93 other returning strikers in this category.[40]

As to a number of other strikers the Company has offered no valid excuse for its failure to comply with their requests for reinstatement. This applies to 26 out of the 34 strikers listed in Schedule 6(b) of the amended answer as to whom the Company claimed that they had not made applications "at anytime after the strike terminated" either because of their having applied during the strike or because they were covered only by a Union letter of application after the strike was called off, which the Company refused to recognize as a valid application. In the same category as the latter group are all those listed in Schedule 6(c). Schedule 6(c) also proceeds on the erroneous premise that Union applications were invalid.

The procedure adopted by the Company for restaffing its plant after the strike was called off further evidences the failure of the Company to recognize its special obligations to the returning strikers. After consulting the Company's attorney, it was decided to contact the employees as they had done in the past. Even where certain operators were badly needed to fill gaps in its production lines, the Company consistent with its practice before the strike, in some cases merely sought to reach them by telephone. In some instances, as will appear in the discussion of the individual cases below, the Company upon failing to reach the striker personally on the telephone, let the matter drop there. In other instances the Company

[40] In view of Rutter's testimony establishing the existence of vacancies in a majority of the cases which were specifically discussed by him, the Examiner cannot give Rutter's general testimoney as to the lack of vacancies any great weight. This point is more fully treated hereinafter in the discussion of the Schedule 6(d) defense.

merely left messages for employees and did not follow up with registered or certified letters. The Company's records of these telephone calls were handwritten notes on scraps of paper which were undated and unsigned in most instances.

In July the Company sent post cards and mimeographed letters to certain strikers inquiring about their availability for work and requesting them to call at the plant, but the Company kept no copies of these post cards or letters. Admittedly, at no time prior to the hearing did the Company seek to contact strikers by registered or certified mail. Nor did the Company ever request the Union to assist it in locating a needed employee. All these circumstances indicate to the Examiner that the Company did not recognize its special obligations to the strikers growing out of its unfair labor practices during the strike.

Under all the circumstances, including the Company's slowness in reinstating strikers and its failure to dismiss replacements to make room for strikers, the Companys failure in a large majority of the cases to substantiate its principal defense of "no vacancy," its failure to recognize the Union's letters as constituting valid applications for reinstatement, and the circumstances indicating a lack of recognition on the Company's part of any special obligation to returning strikers, the Examiner concludes that the Company did not attempt in good faith to reinstate the strikers after the strike was called off.

V. The Specific Defenses Pleaded in the Company's Amended Answer Regarding Individual Strikers

A. General Discussion of the Willful Losses Question

Before discussing the cases of the individual strikers it may be helpful to treat the "willful losses" question which is involved in the case of each of the indi-

vidual strikers. The question concerns the extent of the duty of an employee, whom the employer because of his unfair labor practices is obligated to reinstate, to seek interim employment in order to minimize his wage loss.

The scope of the employee's duty to attempt to minimize his wage loss was first authoritatively defined in *Phelps-Dadge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197–198, in which the Court spoke in terms of having deductions from gross backpay made "not only for actual [interim] earnings by the worker and also for losses which he willfully incurred." The Court in this same opinion went on to say that the Board, in passing upon employer contentions regarding employee failure to mitigate damages, should consider "a clearly unjustifiable refusal to take desirable new employment" (313 U.S. at 199–200).

The Board, construing the *Phelps-Dodge* decision, has held that the employee must make a good-faith effort to obtain interim employment to minimize his wage loss. However, this does not mean that the employee's search for work must meet with "success: it only requires an honest good-faith effort." *N.L.R.B.* v. *Cashman Auto Co.*, 223 F. 2d 823, 836 (C.A. 1). What constitutes a good-faith effort necessarily depends upon the facts and circumstances in each case. However, the following general guides are available. As stated in the Examiner's Report which was adopted by the Board in *Mastro Plastics Corp.*, 136 NLRB 1342, 1359:

> . . . it can be said that in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have

been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age and his personal limitations.

With these considerations in mind the Examiner discusses some of recurring questions which have arisen in passing upon the "willful losses" issue. Several of the employees here involved instead of attempting to find outside jobs, became self-employed, such as operating home laundries, beauty parlors, or furnishing a home sewing service. The Board has consistently held that such self-employment does not terminate an employer's backpay liability. *Harvest Queen Mill and Elevator Company,* 90 NLRB 320, 323; *L. B. Hosiery Co.,* 99 NLRB 630, 634; *Mastro Plastics Corp.,* 136 NLRB 1342, 1350. The Courts have agreed that self-employment does not terminate an employer's backpay liability. *N.L.R.B.* v. *Armstrong Tire and Rubber Company,* 263 F. 2d 680, 683 (C.A. 5); *N.L.R.B.* v. *Efco Manufacturing, Inc.* 227 F. 2d 675, 676 (C.A. 1); *N.L.R.B.* v. *Cashman Auto Co.,* 233 F. 2d 835, 836 (C.A. 1).

Other employees found employment during the backpay period as maids in private homes and did not seek work in sewing factories or other like establishments. Their earnings as maids were less than they would have earned working for the Company. Such situations, the Examiner concludes, do not warrant a finding of a willfull loss of earnings on the part of the employees simply because they have not looked for factory work. It should be borne in mind that the employees here involved, with two exceptions, are all Negroes. All but seven were women. Their educational

advantages were limited. It was the exceptional employee who had finished high school. They were presumably not trained in job seeking. A considerably greater number of job opportunities were presumably open to these Negro women as maids than as factory workers, if the normal ratio prevailed. To judge by the work histories of the employees here involved during and after the strike, housework was the kind of work to which many of the employees here involved automatically turned when they lost their jobs in factories. In the opinion of the Examiner, this cannot be explained by the inherent attractiveness of domestic work. So it is reasonable to attribute the employees choice of such work to the feeling that it was the best solution they could find for their joblessness. Under all the circumstances, failure to seek factory work, in the opinion of the Examiner does not constitute willfully incurring a loss in earnings. Cf. *East Texas Steel Castings Co.*, 116 NLRB 1336, 1344–1345, enforced 255 F. 2d 284 (C.A. 5) (welder's acceptance of lower paying job as a cabdriver).

A few of the strikers, upon obtaining 1 to 3 days' work a week as a maid, did not seek additional work, either as a maid or otherwise. These employees were not completely idle; yet they were not doing their utmost to minimize their losses. Should the Company be relieved of all its obligation to these women because they apparently were content to work less than a full week? The Examiner concludes that a reasonable solution to this problem is to hold that these employees were incurring a partial willful loss of earnings and to measure their gross wages by the ratio of the number of the days they were working to the number of days in a full workweek (the Company worked 5 days a week). For example, for woman working 2 days a week as a maid in any quarter, her gross wages would

be two fifths of the full gross wages of an employee working full time or seeking full-time work in that quarter.

Another question relates to the obligation of the employee who obtains interim employment in another sewing factory or similar establishment but who only works a short workweek. Must this employee seek other full-time employment on her days off or must she seek some sort of day's work on her days off. In the opinion of the Examiner, both of these questions should be answered in the negative. It does not seem reasonable to expect an employee who has worked fairly steadily 3 or 4 days a week to look for a 5-days a week job in which either the employee may not work out satisfactorily or the job may turn out to be of short duration.

A more difficult problem concerns the situation of an employee who obtains interim employment in a sewing factory which works steadily some weeks, but which may regularly have periodic layoffs of weeks, or occasionally months, in duration. Regarding layoffs of a few weeks duration, and it is not shown that the employee has no reasonable expectation of returning to work for this employer, the Examiner concludes that a failure to seek other work during this period does not constitute willful idleness. As to the layoffs of a month or more, even though the employee may anticipate being called back to work momentarily, it would appear incumbent upon her to seek other employment and, upon a showing that the employee had not looked for other work during such a layoff, the Examiner would find a willfully incurred loss of earnings.

However, in case it appeared that the employee was regularly registering for unemployment compensation benefits, a different result would be reached. The record in this case shows that under the Louisiana Em-

ployment Security Act in order to be eligible to receive unemployment compensation the individual must register for work and continue an active application for work. The record also shows that registering for employment was one of the procedural steps taken each week when the employees reported to the office of the State Employment Service in connection with drawing their unemployment compensation. In these circumstances, absent a showing that the employee failed to accept a referral to a job, where it appears that an employee was registering for or drawing unemployment compensation, the Examiner would not be warranted in concluding that the employee by not making other efforts to obtain work was willfully incurring a loss in earnings during such periods.[41] This latter comment applies only to employees having regular jobs who are temporarily laid off.

The Louisiana Employment Security Act contains a provision for employees drawing partial unemployment compensation where their employers can only offer them short workweeks or irregular employment. To draw partial unemployment compensation the employee registers, not at the office of the State Employment Service, but at his employer's establishment. The employee is not considered for referral to a job by the State Employment Service as the employee is regarded as bound to his part-time employer, and under the law it is regarded as desirable that this relation-

[41] This is the Examiner's general conclusion in this regard. As stated below, there are one or two cases in which the Examiner has found employees to have willfully incurred a loss in earnings during period they were drawing unemployment compensation. In these cases, the Examiner concluded upon the facts of their cases, despite the fact that the employees were receiving unemployment compensation, that they were not genuinely interested in finding work.

ship be fostered. Even though the employee is not considered for referral by the State Employment Service while drawing partial unemployment compensation, in view of the policy embodied in the State law, the Examiner finds it inappropriate to hold such employees to be willfully incurring a loss of earnings while thus temporarily idle.

B. *The misconduct defense (applicable to the employees listed in Schedule 6(a)), of the Company's amended answer*

1. General Discussion

For misconduct of strikers to constitute a defense to their reinstatement it must be "so flagrant or violent as to render him unfit for further service." *Trumbull Asphalt Co.*, 139 NLRB 1221, 1222. In such situations the Board normally withholds its normal reinstatement remedy, deeming such relief in such circumstances to be inconsistent with the effectuation of the policies of the Act. In determining during a strike whether alleged misconduct is of such a serious character as to warrant withholding the conventional remedy, consideration must be given not only to the provocation inherent in the Company's unfair labor practices which caused the continuation of the strike, but also to the realities of strike situations. See *Local 833, UAW* v. *N.L.R.B.* (*Kohler Co.*), 300 F. 2d 699, 702 (C.A.D.C.), and cases therein cited. It is with these principles in mind that the Examiner has considered the incidents of alleged misconduct which are apparently relied upon as disqualifying from reinstatement the employees listed in Schedule 6(a) of the Company's amended answer.[42]

[42] In view of the Company's failure to treat the employees' cases individually in its memorandum, the Examiner cannot

The Company asserts in its memorandum that it believed in good faith that the employees listed in Schedule 6(a) were guilty of serious acts of misconduct during the strike and, relying on *Rubin Bros. Footwear, Inc.* v. *N.L.R.B.*, 203 F. 2d 486 (C.A. 5), argues that although it may have failed in part to prove that the employees listed in Schedule 6(a) actually engaged in serious misconduct, since the record shows it believed in good faith that they had engaged in such misconduct, this is sufficient basis for denying reinstatement. While the Board has not acquiesced in the principle of the *Rubin* decision on the Fifth Circuit and the question is now pending before the Supreme Court in *N.L.R.B.* v. *Burnup & Sims, Inc.*, certiorari granted, 375 U.S. 983, even if the Supreme Court should ultimately sustain the *Rubin* principle upon which the Company relies, it would not be applicable in the present situation, which involves purely a question of remedy, and not the question whether an unfair labor practice has been committed.

Reinstatement of the strikers, upon application, was ordered in this case to remedy the Company's refusal to bargain collectively in violation of Section 8(a)(5), which the Board found prolonged the strike. In the *Rubin* case, unlike this case, the Board was considering the employer's refusal to reinstate economic strikers which was alleged to violate Section 8(a)(3) and (1) of the Act. In such situations, the employer's motivation for refusing reinstatement is in issue and the employer's belief as to misconduct may throw light on this issue. In the instant case, which involves the reinstatement of *unfair labor practice* strikers,

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ascertain precisely what conduct the Company is relying upon in each of the individual cases in which the misconduct defense is raised.

upon application, the only question, as indicated above, is whether the employee has so seriously misconducted himself to render him unfit for further employment. In a case like the present the employer's motivation at the time he refuses reinstatement is immaterial. Misconduct of a striker which is unknown to the employer at the time he refuses reinstatement might be the basis of the Board's withholding the reinstatement remedy. It is the nature and seriousness of the employee's conduct rather than the employer's belief in this regard which is determinative. It would be highly illogical and contrary to common sense to have the remedy for an employer's antecedent unfair practices to return on the employer's belief, no matter how mistaken he may be in fact, as to employees' subsequent conduct during a strike.

Before coming to the specific incidents of alleged misconduct which are apparently relied upon as disqualifying from reinstatement the employees listed in Schedule 6(a) of the Company's amended answer, it should be noted, in accordance with Rutter's testimony, that the Company during the strike adopted the policy of not reinstating the strikers who, in Rutter's words "were judged in our opinion to be the hard core that had repeated acts of violence." These strikers, Company witnesses testified, were informed when they personally applied for reinstatement of the reason for the Company's refusal.

Since 8 of the 15 striking employees listed in Schedule 6(a) of the Company's amended answer are implicated by the testimony to a greater or a lesser degree in a disturbance occurring outside the Company's plant on October 21, 1954, it may be helpful if the Examiner sets forth at the outset the salient facts concerning this incident.

2. The October 21, 1954, Incident

Piecing together the testimony of the various witnesses concerning this incident, the Examiner finds as follows: A group of workers in the plant, tired of the harassments they had received at the hands of the strikers going to and from work, decided to do something about it on October 21, 1954. Among the group of about 12 who planned to take action that day was Hazel Tate, who was still employed by the Company at the time of the hearing. Tate, called as a witness by the Union, testified that this group decided to provoke a fight with the pickets during the lunch hour. It appears that, pursuant to the plans of the group, empty coke bottles were lined up along the walls just inside the front door of the plant.

On this occasion two strikers were walking as usual, with their umbrellas. On the Pauline Street side of the plant, Lorraine Lyons was patrolling and Louella Johnson was walking in front of the building on Dauphine Street. At the strike headquarters, which was in the rear of a store at the corner of Dauphine and Independence Streets, across Independence from some houses which were then adjacent to the factory, about eight or more strikers were hanging around waiting to take their turn doing picket duty. A large number of workers were eating their lunches in front of the Company's warehouse (then being built) across Dauphine Street from the main plant.

Between 11:50 and 12 noon that day (the lunch hour ended at noon), Tate and others in the doorway of the plant started taunting the pickets with epithets, and "droves" of workers started coming out of the plant. One of these pushed Louise Gordon (also a worker) into Louella Johnson, who was walking with a picket umbrella in front of the plant. Louella called

to Lula Mae Washington, a picket captain, who was preparing to commence picket duty. Lula Mae approached running, with other strikers following her. Tate challenged Washington to fight. About this time bottles started flying from the plant. Mary Fland ran from the large group of workers eating their lunch across the street to see what was happening to Louise Gordon, her niece. Fland was carrying a tree branch about 18 inches long. Fland got into an argument with Washington. While this was going on bottles and brickbats were flying back and forth thick and fast. A number of windows in the plant were broken, as was the door glass. In the melee Marion Randall was cut on the head with a broken bottle. When Fland retreated inside the plant, she discovered that she had been cut on the back. Fland and Janie Kirk testified that they saw Washington with a penknife in her hand. It is undisputed that thereafter Fland and Washington "tangled," and then Fland discovered that she had been cut. Washington denied having a knife on any occasion during the strike. Washington's denial is not credited. In the Examiner's opinion, Washington was too sweeping in her denials of striker harassment of workers during the strike to be believed. The Examiner finds that Washington was guilty of the stabbing. After the Fland-Washington altercation, the workers were ordered back into the factory. The whole incident lasted about 5 minutes. Work began on schedule when the second bell rang.

Tate, who was one of the ringleaders in the action against the strikers on October 21, 1954, was not discharged or laid off because of her participation in this affair, as the Specification shows. Fland also remained on the payroll despite her agressive acts on this occasion. The record does not reveal what discipline, if

any, was given to the workers who engaged in the bottle-throwing during this incident.

In view of the Company's failure to get rid of the workers who were guilty of the same conduct as the Company argues disqualifies the strikers from reinstatement and the further fact that the disturbance occurred in the course of a bitter strike which was prolonged by the Company's serious unfair labor practices, the Examiner finds that, with the exception of Lula Mae Washington, none of the participants in the October 21, 1954, disturbance has so misconducted herself by participating in this incident alone, as to render her unsuitable for further service with the Company.

[The remainder of the Trial Examiner's Supplemental Decision has not been reproduced, as it deals solely and at great length with individual claims to back pay, which the Board believes to be irrelevant to the instant petition. A copy of the full decision has been lodged with the clerk.]

APPENDIX E

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are as follows:

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—* * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. * * *

JUDICIAL REVIEW

SEC. 10. * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; * * *

U.S. GOVERNMENT PRINTING OFFICE: 1969